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March 8, 2006

Monica S. Desai, Bureau Chief
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Re: Junk Fax Prevention Act of 2005 – CG Docket No. 05-338
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 - CG Docket No. 02-278

Dear Ms. Desai:

With this submission, we supplement the record in these proceedings and respectfully draw your attention to further court rulings relevant to the preemption issues the Commission is considering in the above-referenced dockets. Specifically, the opinions noted below (copies of which are attached) are further support and authority for the view that states may not regulate interstate calls as to matters governed by the Telephone Consumer Protection Act (TCPA), the Junk Fax Prevention Act (JFPA), or this Commission's regulations implementing the TCPA or JFPA.

Most recently, the United States District Court for the Eastern District of California ruled that California has exceeded its jurisdiction insofar as it seeks to apply its law limiting facsimile advertisements to interstate facsimiles. On February 27, 2006, the court in *Chamber of Commerce v. Lockyer*, 2:05-CV-2257-MCE-KJM, determined that Section 17538.43 of California's Business and Professions Code ("SB 833"), which provides no exception for faxes sent based on an established business relationship, "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress because it eliminates the established business relationship exception that Congress expressly codified in the JFPA and nullifies Congress' decisions that unsolicited facsimile advertisements be governed by an 'opt-out' rather than an 'opt-in' scheme." The court concluded this violates the Supremacy Clause and thus renders the state law constitutionally infirm.

The court flatly rejected California's argument – which the State commenters in these proceedings have advocated to this Commission – that section 227(e)(1) of the TCPA allows a state to impose additional restrictions on *intra*state fax advertisements yet also prohibit entirely *inter*state fax advertisements. Describing this as an "ungainly" construction of the TCPA, the court explained that such a reading gives section 227(e)(1) no operative effect, since it would serve "solely to reiterate States' preexisting right to enact more restrictive intrastate regulations on

telecommunications." Instead, the court concluded that, as the Direct Marketing Association maintains, the TCPA allows states to impose more restrictive requirements on intrastate faxes, which they would not be allowed to do without section 227(e)(1), but prohibits states from imposing additional requirements on interstate faxes.

Other courts have reached similar conclusions. In *Klein v. Vision Lab Telecomm., Inc.*, 399 F. Supp. 2d 528 (S.D.N.Y. 2005), the court dismissed the plaintiff's claims based on alleged violations of New York state law restricting facsimile advertisements. Considering the defendant's argument that the TCPA preempted the state law claims, the court determined that New York's must be read to apply only to intrastate communications, and thus dismissed the claims because the allegations involved only interstate communications. *See also Gottlieb v. Carnival Corp.*, 367 F. Supp. 2d 301 (E.D.N.Y. 2005), *vacated and remanded on other grounds*, 2006 U.S. App. LEXIS 2677 (2d Cir. 2006).

Finally, we also note that aspects of the court's decision in *Cellco Partnership v. Hatch*, 431 F.3d 1077, 2005 U.S. App. LEXIS 26887 (8th Cir. 2005) are also relevant in these dockets. Although *Cellco* addressed the preemption of state laws that regulate rates charged for mobile radio services under section 332 of the Communications Act rather than TCPA or JFPA provisions, the State argued that its challenged requirement should survive as a general "consumer protection measure." In the TCPA and JFPA rulemakings, too, states have endeavored to cloak in a "consumer protection" garb their repeated efforts to insinuate themselves in the regulation of interstate communications. States contend that notwithstanding often dramatic departure from federal standards, the varied requirements they seek to impose on interstate telephone and fax solicitations should survive because they are designed to "protect consumers." But as the Court noted in *Cellco*:

> Any measure that benefits consumers, including legislation that restricts rate increases, can be said in some sense to serve as a 'consumer protection measure,' but a benefit to consumers, standing alone, is plainly not sufficient to place a state regulation on the permissible side of the federal/state regulatory line drawn by §332(c)(3)(A). To avoid subsuming the regulation of rates within the governance of 'terms and conditions,' the meaning of 'consumer protection' in this context must exclude regulatory measures . . . that directly impact the rates charged by providers.

The same principle applies to state attempts to regulate conduct governed by matters governed by the TCPA and JFPA. The state laws at issue in these proceedings directly and unmistakably purport to govern matters already addressed by the TCPA and JFPA; that such laws may be perceived to offer some benefit to consumers does not empower states to impose them on interstate communications.

We once again urge the Commission to act promptly and decisively to clarify and ensure that its rules reflect the standards reflected in these decisions - states may not regulate interstate calls as to matters governed by the TCPA and JFPA.

Very truly yours,

Heather L. McDowell (PS)

Ian D. Volner
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Counsel to The Direct Marketing
Association, Inc.

cc: Jerry Cerasale
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Jay C. Keithley
Erica McMahon

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, et al.,

Plaintiffs,

v.

BILL LOCKYER, Attorney General of California, et al.,

Defendants.

2:05-CV-2257-MCE-KJM

MEMORANDUM AND ORDER

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Plaintiffs Chamber of Commerce of the United States of America ("Chamber of Commerce") and Xpedite Systems, LLC d/b/a Premiere Global Services ("Xpedite")(collectively, "Plaintiffs") have filed the instant action against Bill Lockyer, Attorney General of the State of California, and Charlene Zettel, Director of the California Department of Consumer Affairs (collectively, "Defendants") seeking a declaration that, insofar as it applies to interstate facsimile advertisements, Section 17538.43 of California's Business and Professions Code ("SB 833") is preempted by federal law and violates the Commerce Clause.

In addition, Plaintiffs seek an injunction permanently barring enforcement of SB 833. For the reasons set forth fully below, the Court grants Plaintiffs' request for declaratory relief hereby concluding that SB 833 is constitutionally infirm to the extent that it seeks to govern the interstate transmission of unsolicited facsimile advertisements. However, the Court refrains from addressing the issue of permanent injunctive relief until the propriety of such relief can be more fully assessed.

BACKGROUND

This case involves the convergence of certain federal and state laws including the Federal Communications Act of 1934 ("FCA"), the Telephone Consumer Protection Act of 1991 ("TCPA"), as amended by the Junk Fax Protection Act of 2005 ("JFPA")(collectively "Federal Laws"), and California's SB 833. The foregoing Federal Laws generally create a statutory framework that governs interstate telecommunications and, particularly at issue here, the transmission of unsolicited facsimile advertisements. Through SB 833, California's Legislature is seeking to accord the citizens of California with more stringent protections than those afforded under the federal scheme.

The specific divergence between the two schemes that has given rise to this litigation is as follows. The federal scheme permits a party to transmit unsolicited facsimile advertisements to recipients with whom they have an "established business relationship" provided those advertisements bear an opt-out alternative.

Conversely, California's scheme, as embodied in SB 833, omits the established business relationship exception and, instead, requires a sender to obtain express prior consent before transmitting any facsimile advertisements into or out of California.

In order to properly assess the constitutional concerns raised by SB 833, the Court must first set forth both the federal and state schemes to examine the foundation each legislative body was intending to lay. Accordingly, what follows is a brief recitation of the present federal and state regulatory schemes.

A. The Federal Communications Act of 1934

The text of the FCA explains that "[t]he provisions of [the FCA] shall apply to all interstate and foreign communication by wire or radio." 47 U.S.C.S. § 152(a). As a general matter, this provision commits to the FCC the right to govern interstate telecommunications. Likewise, subject to certain exceptions, the FCA generally commits to the States jurisdiction to regulate intrastate telecommunications. 47 U.S.C.S. § 152(b).

B. The Telephone Consumer Protection Act of 1991

In 1991, Congress enacted the TCPA, Pub. L. No. 102-243, 105 Stat. 2394 (1991).

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The TCPA added Section 227 to the FCA making it unlawful "to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement, unless--(i) the unsolicited advertisement is from a sender with an established business relationship with the recipient." 47 U.S.C.S. § 227(b)(1)(C). The TCPA defines an "unsolicited advertisement" as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise." *Id.* at § (a)(5). Congress also included a savings clause, the language of which is set forth in Section II.B. *infra*. *See Id.* at § 227(c)(1).

C. The 1992 Rules

In 1992, the FCC adopted rules implementing the TCPA. In explaining the rule implementing the "established business relationship" exception to the TCPA ban on unsolicited facsimile advertisements, the FCC stated that facsimile transmission of advertisements from persons or entities that have an established business relationship with the recipient can be deemed to be invited or permitted by the recipient. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order*, 7 FCC Rcd. 8752 at 8779, ¶ 54 n.87 (1992). The Commission stated that this "established business relationship" exception was justified because a solicitation to someone with whom a prior business relationship exists does not adversely affect subscriber privacy interests.

Id. ¶ 34; *see id.* ¶ 54 n.87. The 1992 rules continued unabated until 2003 when the FCC proposed a revision to its 1992 rules.

D. The 2003 Rules

In 2003, the FCC announced that it planned to reverse its prior conclusion that an established business relationship provides companies with the necessary express permission to send faxes to their customers. *Final Rule, Rules and Regulations Implementing the Telephone Consumer Protection Act*, 68 Fed. Reg. 44, 144 (2003). Under the proposed 2003 rule, a business would be permitted to advertise by fax only with the prior express permission of the fax recipient, which would have to have been in writing and include the recipient's signature and facsimile number, and could not be in the form of an opt-out provision. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order*, 18 FCC Rcd. 14, 014 (2003).

In response to the 2003 proposed rule on this issue, the Senate Committee on Science, Commerce, and Transportation ("Senate Committee") stated that the FCC's proposed rule revisions "effectively eliminate[ed] the [existing business relationship] exception to the general prohibition on unsolicited fax advertisements." S. Rep. No. 109-76, at 3. The 2003 FCC rule revisions were repeatedly suspended and, ultimately, were rendered moot by the enactment in 2005 of the JFPA.

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E. Junk Fax Protection Act of 2005

On July 9, 2005, President George W. Bush signed into law the Junk Fax Prevention Act of 2005 ("JFPA"), Pub. L. No. 109-21, 119 Stat. 359 (2005). The JFPA amended Section 227 to permit businesses and other entities to send, without the recipient's prior express consent, commercial facsimiles to recipients with whom they enjoy an established business relationship. 47 U.S.C.S. § 227(a)(2). The Senate Committee's report on the JFPA expressly stated that the purpose of the bill was to "[c]reate a limited statutory exception to the current prohibition against the faxing of unsolicited advertisements to individuals without their prior express invitation or permission by permitting such transmission by senders of commercial faxes to those with whom they have an established business relationship." S. Rep. No. 109-76, at 1 (internal quotations omitted).

Although the Senate Committee expressed its view that the established business relationship exception was an appropriate exception to the ban on unsolicited facsimile advertisements, the Senate Committee also determined that it was necessary to provide recipients with the ability to stop future unwanted facsimiles sent pursuant to such relationships. *Id.* at 7. Consequently, the Senate Committee proposed adding a requirement that every unsolicited facsimile advertisement contain an opt-out notice that gives the recipient the ability to stop future unwanted facsimile solicitations and that senders of such advertisements provide recipients with a cost-free mechanism to stop future unsolicited facsimiles. *Id.*

According to the Senate Committee, the "established business relationship" exception permits "legitimate businesses to do business with their established customers and other persons with whom they have an established relationship without the burden of collecting prior written permission to send these recipients commercial faxes." *Id.* at 6. The Senate Committee report went on to explain that abandoning the FCC's 1992 rule in favor of its proposed 2003 rules, would have "significant consequences." *Id.* Specifically, the cost and effort of compliance could place significant burdens on some businesses, particularly those small businesses that rely heavily on the efficiency and effectiveness of facsimile machines. *Id.* Noting that businesses had "appropriately relied" on the 1992 rules over the past decade, the Senate report concluded that "[i]f the revised rules go into effect, the previously legitimate practices will be immediately unlawful, and unsuspecting or uninformed businesses may be subject to unforeseen and costly litigation unrelated to legitimate consumer protection aims." *Id.*

F. The California Statute

On October 7, 2005, Governor Arnold Schwarzenegger signed into law SB 833. As noted above, this California legislation provides that:

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> "It is unlawful for a person or entity, if either the person or entity or the recipient is located within California, to use any telephone facsimile machine, computer, or other device to send, or cause another person or entity to use such a device to send, an unsolicited advertisement to a telephone facsimile machine."

Ch. 667, § 1, 2005 Cal. Stat. 93, 94 (2005).

Facsimiles sent without "prior express invitation or permission" are defined as "unsolicited" under Section 17538.43(a)(2). *Id.* The Assembly Committee on Appropriations explained that SB 833 was being enacted, in part, because Congress was considering the JFPA which codified the established business relationship exception and favored an opt-out scheme rather than an opt-in scheme. *See* Cal. Assembly Comm., Analysis of Sen. Bill 833 (2005-2006 Reg. Sess.), at 1 (July 13, 2005); *see also* Sen. Judiciary Comm., Analysis of Sen. Bill 833 (2005-2006 Reg. Sess.), at 1,3 (April 5, 2005). It is unquestioned that California's legislature, in enacting SB 833, was attempting to accord the citizens of the State of California with greater protections than those afforded under the federal scheme.

STANDARD

Plaintiffs have styled their motion as one for a temporary restraining order, however, they have requested both declaratory relief as well as a permanent injunction. The Parties and the Court agreed at oral argument that this motion should be treated as one for declaratory relief rather than one for injunctive relief.

The operation of the Declaratory Judgment Act is procedural only. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671, 94 L. Ed. 1194, 70 S. Ct. 876 (1950)(citations and quotations omitted). Generally, declaratory judgment actions are justiciable if "there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Cas. Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273, 85 L. Ed. 826, 61 S. Ct. 510 (1941). Declaratory relief is appropriate when, as here, (1) the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) the judgment will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding. *Eureka Fed. Sav. & Loan Asso. v. Am. Cas. Co.*, 873 F.2d 229, 231 (9th Cir. 1989)(citations and quotations omitted).

Plaintiffs are also seeking injunctive relief against enforcement of SB 833's prohibition on interstate facsimile advertising. Plaintiffs originally sought a preliminary injunction, but later sought a temporary restraining order. In their prayer for relief, Plaintiffs requested permanent injunctive relief. Defendants approached the present motion as one for preliminary relief as opposed to one for permanent relief. Because the standards for each are distinct, the Court inquired at oral argument whether Defendants were prepared to proceed on Plaintiffs' request for injunctive relief as a permanent rather than preliminary or temporary remedy. Defendants indicated that more time would be required to properly respond to Plaintiffs' request for permanent relief.

Accordingly, while the Court is prepared to rule on Plaintiffs' Motion for Declaratory Relief, the Court reserves its judgment regarding the issuance of injunctive relief and will address that matter, if necessary, after a full hearing on the merits.

ANALYSIS

As noted above, California's SB 833 attempts to heighten the restrictions applied to the transmission of unsolicited facsimile advertisements. Specifically, SB 833 omits the "established business relationship" exception provided under Federal Law and, instead, requires any party seeking to transmit a facsimile advertisement into or out of California to obtain express prior consent from the recipient before doing so. The salient distinction between Federal Law and SB 833 is two-tiered. First, Federal Law expressly permits a party to transmit an unsolicited facsimile advertisement to those with whom an established business relationship exists while SB 833 omits any such exception. Second, Federal Law permits senders to transmit unsolicited advertising facsimiles under the established business relationship exception so long as the advertisement bears an "opt-out" alternative while SB 833 requires senders to obtain an affirmative "opt-in" before engaging in any such transmission.

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I. JURISDICTION

As their lead argument, Plaintiffs aver that the State of California has no jurisdiction to regulate interstate commerce as it purports to do through SB 833 because that authority is the exclusive jurisdiction of the FCC. Plf.s' Mtn. for Temp. Restraining Order P. 12 - 16 ("Plf.s' Memo."). Conversely, Defendants argue that the FCA reserves to the States the right to regulate certain interstate communications including the transmission of unsolicited facsimile advertisements. Def.s' Opp. to Mtn. for Temp. Restraining Order P. 15 - 18 ("Def.s' Opp.").

When speaking to the question of whether the FCC has exclusive jurisdiction to regulate interstate telecommunications, the Supreme Court explained that the FCA generally grants to the FCC the authority to regulate "interstate and foreign commerce in wire and radio communication," 47 U.S.C.S. § 151, while expressly denying the FCC "jurisdiction with respect to ... intrastate communication service ...." 47 U.S.C.S. § 152(b). *Public Serv. Com v. FCC*, 476 U.S. 355, 360 (1986)(internal citations omitted). However, the Court went on to clarify that "... while the FCA would seem to divide the world ... neatly into two hemispheres -- one comprised of interstate service, over which the FCC would have plenary authority, and the other made up of intrastate service, over which the States would retain exclusive jurisdiction -- in practice, the realities of technology and economics belie such a clean parceling of responsibility." *Id.*

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Plaintiffs' argument, that States are devoid of authority to regulate interstate telecommunications, is simply too broad. In fact, as expressly noted above, the Supreme Court recognized that such a clean parceling of responsibility is unworkable. *Id.* In addition, there are many examples of Congressional intent to reserve certain rights to the States. For example, the FCA expressly reserves the right to "impose ... requirements necessary to ... protect the public safety and welfare ... and safeguard the rights of consumers" to States. 47 U.S.C.S. § 253(b). Similarly, the FCA expressly permits States to establish terms and conditions for wireless services, other than those that directly regulate rates or market entry. 47 U.S.C.S. § 332(c)(3)(A).

As is clear from the foregoing, the FCA contains exceptions to the general proclamation that interstate telecommunications are committed to the FCC's jurisdiction alone. Accordingly, the Court cannot dispose of the matter before it by summarily concluding that, as a matter of law, the FCC has plenary jurisdiction to regulate interstate telecommunications thereby precluding California from doing so. Instead, the Court must narrow its focus to whether the language of the Federal Law grants to the States the right to regulate the transmission of unsolicited facsimile advertisements as California purports to do through SB 833.

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II. PREEMPTION

When the Federal Government acts within the authority it possesses under the Constitution, it is empowered to preempt state laws to the extent it is believed that such action is necessary to achieve its purposes. *See New York v. FCC*, 486 U.S. 57, 63-64, 108 S. Ct. 1637, 100 L. Ed. 2d 48 (1988). The Supremacy Clause of the Constitution gives force to federal action of this kind by stating that "the Laws of the United States which shall be made in Pursuance" of the Constitution "shall be the supreme Law of the Land." U.S. Const., Art. VI, cl. 2.

Preemption occurs when Congress, in enacting a federal statute, expresses a clear intent to preempt state law, when there is outright or actual conflict between federal and state law, where compliance with both federal and state law is in effect physically impossible, where there is implicit in federal law a barrier to state regulation, where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. *La. Pub. Serv. Comm'n*, 476 U.S. at 369.

Irrespective of the variety of preemption at issue, the Ninth Circuit has clarified that the touchstone issue is not the nature of the state regulation, but the language and congressional intent of the specific federal statute.

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City of Auburn v. United States, 154 F.3d 1025, 1031 (9th Cir. 1998)(citing *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 738, 85 L. Ed. 2d 728, 105 S. Ct. 2380 (1985); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95, 77 L. Ed. 2d 490, 103 S. Ct. 2890 (1983) (Preemption of state law is compelled if Congress' command is explicitly stated in the federal statute's language or implicitly contained in its structure or purpose.))

A. Presumption Against Preemption

First, because the States are independent sovereigns in our federal system, the federal courts have long presumed that Congress does not cavalierly preempt state-law causes of action. *Bates v. Dow Agrosciences L.L.C.*, 125 S. Ct. 1788, 1801 (2005)(citations and quotations omitted). While the foregoing presumption against preemption is the starting point in all preemption cases, this presumption is not always applicable. Indeed, when the State regulates in an area where there has been a history of significant federal presence, the presumption usually does not apply. *Ting v. AT&T*, 319 F.3d 1126, 1136 (9th Cir. 2003). Here, there is no dispute that the area of interstate telecommunications has a history of significant federal presence. Indeed, since the passing of the FCA in 1934, there has been a tremendous amount of federal legislation regarding interstate telecommunications including legislation directly concerned with the transmission of unsolicited facsimile advertisements.

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Consequently, the Court finds that the presumption against preemption inapplicable to the case at bar.

B. Statutory Construction

As explained above, Section 151 of the FCA, together with the later decisions interpreting the same, generally allocate to the FCC the right to govern interstate telecommunications. Here, however, Congress included a savings clause that parses the authority to regulate the use of telephone equipment, including facsimile machines, between the States and the FCC. That savings clause provides as follows:

> "STATE LAW NOT PREEMPTED.—Except for [certain specified provisions of the TCPA], nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits (A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements."

Id. at § 227(e)(1).

Defendants urge the Court to dissect the forgoing provision into two parts as follows: Nothing in this section shall preempt any state law that [clause 1] imposes more restrictive *intrastate* requirements or regulations on; or [clause 2] which prohibits the use of telephone facsimile machines to send unsolicited advertisements. Defendants first suggest that the savings clause was included in Section 227 simply to make clear that Federal Law does not preempt more restrictive intrastate requirements or regulations.

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Defendants go on to argue that Congress' inclusion of the *intrastate* qualifier in clause 1 and its omission of that same qualifier in clause 2 should be interpreted to mean that Federal Law does not preempt more restrictive intrastate requirements nor does it preempt prohibitions of either intrastate or interstate telecommunications.

Defendants' proposed interpretation produces an ungainly construction that the Court does not believe Congress intended. In addition, Defendants' construction fails to answer the salient issue in this case. That is, whether the savings clause acts to salvage a State's right to pass more restrictive *interstate* requirements on transmitters of unsolicited facsimile advertisements.

In construing the language of a statute, the Supreme Court has clarified that it is the duty of the Court to give effect, if possible, to every clause and word. *Duncan v. Walker*, 533 U.S. 167, 174 (2001)(citing *United States v. Menasche*, 348 U.S. 528, 538-539, 99 L. Ed. 615, 75 S. Ct. 513 (1955); *see also Williams v. Taylor*, 529 U.S. 362, 404, 146 L. Ed. 2d 389, 120 S. Ct. 1495 (2000)(describing this rule as a "cardinal principle of statutory construction").

Under Defendants' rendition, Congress' inclusion of Section 227(e)(1) has no operative effect because it acts solely to reiterate States' preexisting right to enact more restrictive intrastate regulations on telecommunications. Under this theory, the entire first section of the savings clause could be omitted without affecting a State's right to enact intrastate regulations on telecommunications.

The Court must be "reluctant to treat statutory terms as surplusage" in any setting. *Babbitt v. Sweet Home Chapter, Communities for Great Ore.*, 515 U.S. 687, 698, 132 L. Ed. 2d 597, 115 S. Ct. 2407 (1995). In order to give the savings clause an operative meaning, the Court hereby concludes that Section 227(e)(1) salvages, rather than merely reiterates, States' rights to govern intrastate transmissions of unsolicited facsimile advertisements.

In light of the Court's conclusion that Section 227(e)(1) saves States' rights to impose more restrictive *intrastate* regulations from preemption, it turns to the question of whether that Section also acts to salvage regulations that impose restrictions on *interstate* telecommunications as California purports to do through SB 833. Here, the Court must consider Congress' inclusion of the word "intrastate" in the savings clause. If the savings clause is construed to preserve the right to restrict both intrastate and interstate telecommunications, then the word "intrastate" places no constraint on the States' jurisdiction over telecommunications and the inclusion of the word "intrastate" would be surplusage. As noted above, the Court believes that its duty to give each word some operative effect where possible precludes such a construction.

In addition to the foregoing examination of the statutory language, an examination of the legislative history of the federal scheme shows that Congress' purpose in passing the JFPA was to retain the established business relationship exception for the transmission of unsolicited facsimile advertisements.

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Specifically, in 2003 when the FCC proposed to abolish the established business relationship exception, Congress responded by enacting the JFPA and codifying that exception. Further, in the same report that the Senate Committee expressed its view that the established business relationship exception was an appropriate exception to the ban on unsolicited facsimile advertisements, it also determined that an opt out scheme would present an appropriate mechanism to stop unwanted facsimile advertisements. S. Rep. No. 109-76, at 7. This countermeasure is evidence that Congress understood the concerns voiced by consumers and elected to create an opt-out scheme to address those concerns.

In this instance, SB 833 stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress because it eliminates the established business relationship exception that Congress expressly codified in the JFPA and nullifies Congress' decision that unsolicited facsimile advertisements be governed by an "opt-out" rather than an "opt-in" scheme. *See Hines v. Davidowitz*, 312 U.S. 52, 67, 85 L. Ed. 581, 61 S. Ct. 399 (1941); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 899, 146 L. Ed. 2d 914, 120 S. Ct. 1913 (2000)(quoting *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287, 131 L. Ed. 2d 385, 115 S. Ct. 1483 (1995)). Consequently, the Court finds that, to the extent California attempts to regulate the *interstate* transmission of unsolicited facsimile advertisements through SB 833, it has exceeded its jurisdiction rendering that portion of the statute violative of the Supremacy Clause and, therefore, constitutionally infirm.

In conclusion, the Court wishes to stress that it is mindful of the burden created by unsolicited facsimile advertisements. The Court recognizes that unsolicited advertisements transmitted via facsimile machines cost recipients untold resources in the form of time and money. Despite these realities, the Court cannot unilaterally raze the legal landscape carefully cultivated by Congress. In fact, today's decision leaves untouched the protections against unsolicited faxes afforded by Federal Law as well as California's SB 833 to the extent it applies to intrastate telecommunications. Specifically, unsolicited faxes to individuals from entities with whom they do not enjoy a business relationship are still barred under Federal Law. Similarly, consumers' retain the right to preclude, or opt-out, of unsolicited faxes even when an established business relationship does exist. Indeed, while SB 833 suffers from constitutional infirmity with respect to its interstate reach, the protections afforded California consumers for intrastate facsimile transmissions remain inviolate.

CONCLUSION

The Court finds that a judgment in favor of Plaintiffs will serve a useful purpose in clarifying and settling the constitutional issues raised by SB 833 and will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to this action. The Court concludes that SB 833 is unconstitutional to the extent it attempts to govern interstate transmission of unsolicited facsimile advertisements.

Accordingly, declaratory judgment is appropriate and final judgement in favor of Plaintiffs is therefore entered. However, the Court reserves judgment regarding injunctive relief until the Parties have a full and fair opportunity to be heard on the merits of their respective claims.

IT IS SO ORDERED.

DATED: February 27, 2006

MORRISON C. ENGLAND, JR
UNITED STATES DISTRICT JUDGE

BENJAMIN KLEIN and ATLAS TELECOMMUNICATIONS OF ROCKLAND COUNTY, INC., a New York Corporation, Plaintiffs, - against - VISION LAB TELECOMMUNICATIONS, INC., a Florida Corporation, Defendant.

05 Civ. 3615 (WCC)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

399 F. Supp. 2d 528; 2005 U.S. Dist. LEXIS 29541

November 18, 2005, Decided

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant filed a Fed. R. Civ. P. 12(b)(6) motion to dismiss certain claims brought by plaintiffs seeking damages for the receipt of unsolicited faxes from the defendant and alleging violations of the Telephone Consumer Protection Act (TCPA), 47 U.S.C.S. § 227(b), and its state counterpart, N.Y. Gen. Bus. Law § 396-aa. Plaintiffs, in turn, filed a motion to remand for lack of subject matter jurisdiction under the TCPA.

OVERVIEW: Plaintiffs sought damages under the TCPA related to their receipt of unsolicited faxes from defendant. In its motion to dismiss, the defendant argued that the plaintiffs' damages claims, brought under 47 C.F.R. § 68.318(d), a regulation which governed facsimile sender identification, did not present an actionable claim under the TCPA. In seeking remand, the plaintiffs contended that the TCPA granted state courts exclusive jurisdiction over private causes of action brought under the Act. The district court held that it had subject matter jurisdiction over the plaintiffs' TCPA claims because Congress did not intend to preclude federal diversity jurisdiction, 28 U.S.C.S. § 1332, for claims brought under the TCPA. However, the court granted the plaintiffs' request for interlocutory review of its jurisdictional finding because substantial ground for difference of opinion existed as to its finding of jurisdiction. Finally, the court granted the defendant's motion to dismiss on finding, inter alia, that violations of 47 C.F.R. § 68.318(d) were not actionable under the TCPA, and the TCPA preempted plaintiffs' state law claims, which all related to interstate facsimile transmissions.

OUTCOME: Plaintiffs' motion to remand was denied and the defendant's motion to dismiss certain of the plaintiffs' claims was granted. In addition, the plaintiffs' request for interlocutory appeal was granted as to the issue of the district courts' subject matter jurisdiction over the plaintiffs' TCPA claims.

LexisNexis(R) Headnotes

Civil Procedure > Removal

[HN1] A defendant may remove a cause of action initially filed in state court provided the action is one of which the district courts of the United States have original jurisdiction. 28 U.S.C.S. § 1441(a). It is well settled that removal statutes are to be strictly construed against removal, with all doubts resolved in favor of remand, as removal jurisdiction undercuts federalism and abridges the deference courts generally give to a plaintiff's choice of forum.

Civil Procedure > Removal
Civil Procedure > Removal > Basis for Removal

[HN2] When a party removes a state court action to the federal court on the basis of diversity of citizenship, and the party seeking remand challenges the jurisdictional predicate for removal, the burden falls squarely upon the removing party to establish its right to a federal forum by competent proof.

Communications Law > Federal Acts > Telephone Consumer Protection Act
[HN3] The Telephone Consumer Protection Act (TCPA) prohibits the use of any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine. 47 U.S.C.S. § 227(b)(1)(C). Recipients of unsolicited fax advertisements may bring a private right of action under § 227(b)(3) of the TCPA, 47 U.S.C.S. § 227(b)(3).

Communications Law > Federal Acts > Telephone Consumer Protection Act
[HN4] See 47 U.S.C.S. § 227(b)(3).

Civil Procedure > Jurisdiction > Diversity Jurisdiction
Communications Law > Federal Acts > Telephone Consumer Protection Act
[HN5] Diversity jurisdiction provides a basis for hearing Telephone Consumer Protection Act (TCPA), 47 U.S.C.S. § 227, claims in federal court because Congress did not intend to preclude federal diversity jurisdiction pursuant to 28 U.S.C.S. § 1332 for claims brought under the TCPA.

Civil Procedure > Jurisdiction > Diversity Jurisdiction
Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Federal Question Jurisdiction
[HN6] The diversity jurisdiction statute, 28 U.S.C.S. § 1332, is not a general jurisdictional grant nor is it akin to 28 U.S.C.S. § 1331 providing for the federal question jurisdiction. Rather, diversity jurisdiction, expressly contemplated by U.S. Const. art. III, is an independent basis for federal jurisdiction created to prevent discrimination against nonresident defendants regardless of whether federal law is involved.

Civil Procedure > Jurisdiction > Diversity Jurisdiction
Communications Law > Federal Acts > Telephone Consumer Protection Act
[HN7] Where the requirements for diversity jurisdiction under 28 U.S.C.S. § 1332 are met, there is no reason to interpret the Telephone Consumer Protection Act (TCPA), 47 U.S.C.S. § 227, to preclude the jurisdiction of the federal courts. Moreover, it is clear that Congress recognized the advantages of litigating large TCPA cases in federal court, since Congress determined that the litigation of TCPA cases brought by state attorneys general or the Federal Communications Commission should take place exclusively in the federal courts.

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders
[HN8] A federal district court may permit an interlocutory appeal if it finds that: (1) the order involves a controlling question of law, (2) as to which there is substantial ground for difference of opinion, and that (3) appeal from the order may materially advance the ultimate termination of the litigation. 28 U.S.C.S. § 1292(b). The trial judge has substantial discretion in deciding whether or not to certify, and the court should construe the requirements for certification strictly. Indeed, certification is warranted only where exceptional circumstances exist.

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders
[HN9] Leave to appeal from interlocutory orders should be granted only in "exceptional circumstances" because to do otherwise would contravene the well-established judicial policy of discouraging interlocutory appeals and avoiding delay and disruption which results from such piecemeal litigation.

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

[HN10] For purposes of interlocutory appeal, 28 U.S.C.S. § 1292(b), a question of law is "controlling" if reversal of the district court's order would terminate the action, such as the case of subject matter jurisdiction for example. Likewise, an immediate appeal is considered to advance the ultimate termination of the litigation if that appeal promises to advance the time for trial or to shorten the time required for trial. However, the mere presence of a disputed issue that is a question of first impression, standing alone, is insufficient to demonstrate a substantial ground for difference of opinion.

Civil Procedure > Pleading & Practice > Defenses, Objections & Demurrers > Failure to State a Cause of Action
[HN11] On a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), the issue is whether the claimant is entitled to offer evidence to support the claims. A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Civil Procedure > Pleading & Practice > Defenses, Objections & Demurrers > Failure to State a Cause of Action
[HN12] Generally, conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a Fed. R. Civ. P. 12(b)(6) motion to dismiss. Allegations that are so conclusory that they fail to give notice of the basic events and circumstances of which plaintiff describes, are insufficient as a matter of law.

Civil Procedure > Pleading & Practice > Defenses, Objections & Demurrers > Failure to State a Cause of Action
[HN13] On a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), a court must accept as true all of the well-pleaded facts and consider those facts in the light most favorable to the plaintiff.

Communications Law > Federal Acts > Telephone Consumer Protection Act
[HN14] See 47 U.S.C.S. § 227(d)(1)(B).

Communications Law > Federal Acts > Telephone Consumer Protection Act
[HN15] See 47 C.F.R. § 68.318(d).

Communications Law > Federal Acts > Telephone Consumer Protection Act
[HN16] Under the Telephone Consumer Protection Act, it is the province of the state attorneys general and the Federal Communications Commission to sue fax broadcasters for technical violations. 47 U.S.C.S. § 227(f)(1), (7); 47 U.S.C.S. § 503(b)(1), (5). It is not the province of the court to add private rights of action not clearly authorized by Congress.

Constitutional Law > Supremacy Clause
[HN17] Federal law can preempt state law with an express statement from Congress, without an express statement when the federal statute implies an intention to preempt state law or when state law directly conflicts with federal law. Courts addressing claims of preemption start from the presumption that Congress does not intend to supplant state law. Congress' intent primarily is discerned from the language of the pre-emption statute and the "statutory framework" surrounding it. This includes the structure and purpose of the statute as a whole, as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law.

Communications Law > Federal Acts > Telephone Consumer Protection Act
[HN18] See 47 U.S.C.S. § 227(e)(1).

Communications Law > Telephony
[HN19] See N.Y. Gen. Bus. Law § 396-aa.

Communications Law > Federal Acts > Telephone Consumer Protection Act
Communications Law > Telephony
[HN20] N.Y. Gen. Bus. Law § 396-aa applies only to intrastate communications in view of Congress's intent that the Telephone Consumer Protection Act, 47 U.S.C.S. § 227, extend the reach of state laws by regulating interstate communications.

Civil Procedure > Costs & Attorney Fees > Attorney Fees
Communications Law > Federal Acts > Telephone Consumer Protection Act
[HN21] The Telephone Consumer Protection Act, 47 U.S.C.S. § 227, makes no provision for attorney's fees or costs.

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JUDGES: William C. Conner, Sr. United States District Judge.

OPINIONBY: William C. Conner

OPINION:

[*530] **OPINION AND ORDER**

CONNER, Senior D.J.:

On March 14, 2005, plaintiffs Benjamin Klein and Atlas Telecommunications of Rockland County, Inc. ("Atlas") (collectively, "plaintiffs") brought a state court action against defendant Vision Lab Telecommunications, Inc. ("Vision Lab") alleging violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227(b), ("TCPA" or the "Act") and its state counterpart, section 396-aa of the New York General Business Law. Vision Lab removed the case pursuant to 28 U.S.C. § § 1441 and 1446, asserting removal was proper under the diversity jurisdiction statute, 28 U.S.C. § 1332. Plaintiffs move to remand arguing that this Court [**2] lacks subject matter jurisdiction because the TCPA grants state courts exclusive jurisdiction over private causes of action brought under 47 U.S.C. § 227(b). In their reply memorandum, plaintiffs requested alternative relief in the form of a certification for interlocutory appeal if this Court denies remand.

Shortly thereafter, defendant filed a motion to dismiss certain of plaintiffs' claims under FED. R. CIV. P. 12(b)(6) because: (1) plaintiffs' damages claims alleging violations of 47 C.F.R. § 68.318(d), a Federal Communications Commission ("F.C.C.") regulation governing facsimile sender identification, do not present an actionable claim under the TCPA; (2) plaintiffs' claims arising from interstate facsimile transmissions under the New York State statute are preempted by the TCPA; and (3) plaintiffs' prayer for attorney's fees is not authorized by either the federal or state statutes at issue in this case.

For the reasons stated below, plaintiffs' motion to remand is denied and defendant's motion to dismiss certain of plaintiffs' claims is granted. In addition, plaintiffs' request for certification [**3] for interlocutory appeal is granted. Accordingly, the action is stayed pending the decision of the Court of Appeals for the Second Circuit.

BACKGROUND

Klein, a resident of the State of New York, serves as C.E.O. of Atlas, a New York corporation with its principal place of business in Monsey, New York. (V. Complt. PP1-2.) Vision Lab is a Florida corporation with its principal place of business in Miami Beach, Florida. (*Id.* P3.)

Plaintiffs allege that from May 2004 to February 2005, Vision Lab faxed in excess of 150 unsolicited advertisements to three telephone numbers registered to plaintiffs and linked to fax machines. Specifically, plaintiffs allege that Vision Lab faxed Klein seventy unsolicited advertisements, including twelve unsolicited advertisements for travel services and/or vacations; seventeen unsolicited advertisements for mortgages and/or mortgage services; forty unsolicited advertisements for stocks and/or stock investments; and one unsolicited advertisement for notary public training seminars. (*Id.* PP6-9.) In addition, plaintiffs allege that Vision Lab faxed Atlas ninety-five unsolicited advertisements, including eleven unsolicited advertisements for [**4] travel services and/or vacations; ten unsolicited advertisements for mortgages and/or mortgage services; seventy-one unsolicited advertisements for stocks and/or stock investments; and three unsolicited advertisements for notary public training seminars. (*Id.* PP14-16, 21-24.) Plaintiffs state that all these faxes were "wholly unsolicited" and

were sent without the consent of either Klein or Atlas. (*Id.* PP10, 17, 25.) Plaintiffs add that Vision Lab, a "facsimile broadcaster," "has willfully arranged for and caused hundreds of thousands of similar unsolicited faxes to be sent to fax machines all over the United [*531] States without the consent" of the recipients. (*Id.* PP11, 13, 18, 20, 26, 28.)

Plaintiffs commenced this action against Vision Lab in New York Supreme Court by causing it to be served with a Verified Complaint on March 14, 2005. In the Complaint, plaintiffs allege Vision Lab committed 658 violations n1 of § 227(b) of the TCPA, which makes it unlawful to use any fax machine, computer, or other device to send unsolicited advertisements to a fax machine. This included 493 alleged violations of 47 C.F.R. § 68.318(d), an F.C.C. regulation dictating [**5] that fax transmissions bear certain sender identification information, which plaintiffs assert was prescribed under, and therefore actionable under, 47 U.S.C. § 227(b). Specifically, plaintiffs claim that all but two of the 165 faxes n2 caused three individual violations of § 68.318(d) by failing to: (1) with one exception, identify the business, other entity or individual that sent the faxes; (2) with one exception, clearly indicate the telephone number of the sending machine; and (3) clearly indicate the name of the fax broadcaster under which the fax broadcaster was registered to conduct business. (*Id.* PP12, 19, 27.) Based on the statutory amount of $ 500 per violation, plaintiffs claim total statutory damages of $ 329,000, or $ 139,500 for violations against Klein and $ 189,500 for violations against Atlas. (*Id.* PP39, 47.) Plaintiffs increase this total to $ 987,000 to reflect treble damages available under 47 U.S.C. § 227(b)(3) for defendant's alleged willful and knowing violations. (*Id.* PP40, 48.)

n1 This comprised 279 violations against Klein and 379 violations against Atlas. (V. Complt. PP38, 46.)

[**6]

n2 This Court calculated defendant sent 165 faxes; however, paragraph 6 of the Affidavit of Aytan Y. Bellin in support of plaintiffs' motion to remand indicates defendant sent 166 faxes.

Plaintiffs also allege violations of N.Y. GEN. BUS. LAW § 396-aa, which makes it unlawful to transmit advertisements by fax. Because § 396-aa exempts transmissions of five pages or less sent between the hours of 9:00 p.m. and 6:00 a.m., (*see* N.Y. GEN. BUS. LAW. § 396-aa(1)), plaintiffs claim only 119 violations of this statute--fifty-seven violations against Klein and sixty-two against Atlas. (V. Complt. PP42, 50.) Plaintiffs seek statutory damages in the amount of $ 5,700 for Klein and $ 6,200 for Atlas, for a total of $ 11,900, based on the statutory amount of $ 100 per violation. (*Id.* PP44, 52.) In addition, plaintiffs seek attorney's fees and costs.

DISCUSSION

I. Plaintiffs' Motion to Remand

[HN1] A defendant may remove a cause of action initially filed in state court provided the action is one "of which the district courts of the United States have [**7] original jurisdiction." 28 U.S.C. § 1441(a). It is well settled that removal statutes are to be strictly construed against removal, with all doubts resolved in favor of remand, as removal jurisdiction undercuts federalism and abridges the deference courts generally give to a plaintiff's choice of forum. *See id.; see also In re NASDAQ Mkt. Makers Antitrust Litig.*, 929 F. Supp. 174, 178 (S.D.N.Y. 1996) ("Removal jurisdiction must be strictly construed, both because the federal courts are courts of limited jurisdiction and because removal of a case implicates significant federalism concerns."); *Leslie v. Banc-Tec Serv. Corp.*, 928 F. Supp. 341, 347 (S.D.N.Y. 1996). [HN2] "When a party removes a state court action to the federal court on the basis of diversity of citizenship, and the party seeking remand challenges the jurisdictional predicate for removal, the burden falls squarely upon the removing party to establish [*532] its right to a federal forum by competent proof." *R.G. Barry Corp. v. Mushroom Makers, Inc.*, 612 F.2d 651, 655 (2d Cir. 1979); *see also Caterpillar v. Williams*, 482 U.S. 386, 391-92, 107 S. Ct. 2425, 96 L. Ed. 2d 318 (1987). [**8]

Defendant removed the present action pursuant to the diversity jurisdiction statute, 28 U.S.C. § 1332, asserting complete diversity of citizenship of the parties and an amount in controversy in excess of $ 75,000. (*See* Notice of Removal at 1-4.) Plaintiffs rightly do not contest that the diversity jurisdiction statute's requirements are met. The requisite amount in controversy was properly pled, and the parties are of completely diverse citizenship: plaintiffs are a resident of New York and a New York corporation with its principal place of business in New York, and defendant is a Florida corporation with its principal place of business in Florida. Rather, plaintiffs contend that removal of this action was improper because the TCPA granted state courts exclusive jurisdiction over private causes of action brought under 47 U.S.C. § 227(b)(3).

[HN3] The TCPA prohibits the "use [of] any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine." 47 U.S.C. § 227(b)(1)(C). Recipients of unsolicited fax advertisements may bring a private right

of action [**9] under § 227(b)(3) of the TCPA, which provides:

> [HN4] A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring an action in an appropriate court of that State --
>
> > (A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,
> > (B) an action to recover for actual monetary loss from such a violation, or to receive $ 500 in damages for each such violation, whichever is greater, or
> > (C) both such actions.
>
> If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

Plaintiffs rely extensively on the Second Circuit's decision in *Foxhall Realty Law Offices, Inc. v. Telecomms. Premium Servs. Ltd.*, 156 F.3d 432 (2d Cir. 1998), to support their position that § 227(b)(3) grants state courts exclusive jurisdiction over claims under the Act to the complete exclusion of the federal courts. In *Foxhall,* the Second [**10] Circuit stated that "the text of the TCPA indicates that Congress intended to assign private rights of action exclusively to courts other than the federal district courts." 156 F.3d at 436. The Second Circuit observed that two other circuit courts and one district court also ruled that § 227(b)(3) explicitly provided for exclusive state court jurisdiction. *See id.* at 434-35 (citing *Nicholson v. Hooters of Augusta, Inc.*, 136 F.3d 1287, 1289 (11th Cir. 1998), *modified* 140 F.3d 898 (11th Cir. 1998); *Chair King, Inc. v. Houston Cellular Corp.*, 131 F.3d 507, 509 (5th Cir. 1997); *Murphey v. Lanier,* 997 F. Supp. 1348 (S.D. Cal. 1998)).

However, as plaintiffs themselves recognize, the decision in *Foxhall* addressed removal under general federal question jurisdiction pursuant to 28 U.S.C. § 1331, and not the general grant of diversity jurisdiction under 28 U.S.C. § 1332. While plaintiffs argue that this distinction "is of no consequence," (Pls. Mem. Supp. Mot. Remand at 6), this Court cannot agree. We recognize that numerous Courts of Appeal [**11] have addressed--and unanimously rejected--removal of § 227(b)(3) claims based on federal question jurisdiction. *See* [*533] *Murphey v. Lanier,* 204 F.3d 911, 914 (9th Cir. 2000); *Erie-Net, Inc. v. Velocity Net, Inc.*, 156 F.3d 513, 516-17 (3d Cir. 1998); *Foxhall,* 156 F.3d at 435-38 (2d Cir. 1998); *Nicholson,* 136 F.3d at 1287-88 (11th Cir. 1998); *Chair King,* 131 F.3d at 509 (5th Cir. 1997); *International Science & Tech. Inst. v. Inacom Communs.*, 106 F.3d 1146, 1150 (4th Cir. 1997). However, only the Court of Appeals for the Seventh Circuit has addressed whether diversity jurisdiction under § 1332 may provide a basis for hearing TCPA claims in federal court; the Court of Appeals found that it did, in part because that case involved the Class Action Fairness Act and whether that Act allowed for removal in the context of the TCPA. *See Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, No. 05-8024, 2005 WL 2665602, at *6 (7th Cir. Oct. 20, 2005). This Court is not persuaded that the reasoning of the Courts of Appeal cases analyzing federal question jurisdiction extends to removal based on diversity. [**12] *See Accounting Outsourcing, LLC v. Verizon Wireless Personal Commc'ns, LP,* 294 F. Supp. 2d 834, 839-40 (M.D. La. 2003) ("Nothing in the reasoning of any of the courts' opinions, however, suggests it would be logical to extend that reasoning to eliminate diversity jurisdiction.").

As Chief Judge Korman of the Eastern District of New York noted in a recent unpublished decision involving defendant Vision Lab and an identically grounded motion to remand, "an apparent consensus is emerging on this subject among those district courts which have addressed the applicability of § 1332 to TCPA claims." *Saporito v. Vision Lab Telecomms., Inc.*, No. 05-CV-1007, slip op. at 6 (E.D.N.Y. May 10, 2005) (*"Saporito I"*). Indeed, no less than five other district courts came to the same conclusion as Chief Judge Korman: [HN5] diversity jurisdiction provides a basis for hearing TCPA claims in federal court. *See Accounting Outsourcing,* 294 F. Supp. 2d at 840 (concluding "that Congress did not intend to preclude federal diversity jurisdiction pursuant to § 1332 for claims brought under the TCPA"); *Kopff v. World Research Group, LLC,* 298 F. Supp. 2d 50, 55 (D.D.C. 2003) [**13] ("Removal of TCPA claims on the basis of diversity . . . is permissible."); *Kinder v. Citibank,* 2000 U.S. Dist. LEXIS 13853, No. 99-CV-2500 W, 2000 WL 1409762, at *3 (S.D. Cal. Sept. 14, 2000) ("Nothing in the Ninth Circuit's analysis [of *Murphy v. Lanier*] suggests that the TCPA precludes district courts from hearing private TCPA claims where some other independent basis for federal jurisdiction exists, such as diversity of citizenship or supplemental jurisdiction." (emphasis in original)); *see alsoGold Seal Termite &*

Pest Control Co. v. DirecTV, Inc., 2003 U.S. Dist. LEXIS 11205, No. 03-CV-00367-LAM.-WTL, 2003 WL 21508177, at *4 (S.D. Ind. June 10, 2003) (concluding removal would be proper under diversity jurisdiction, but finding amount in controversy not met); *Biggerstaff v. Voice Power Telecomms.,* 221 F. Supp. 2d 652 (D.S.C. 2002) (noting that "it is not evident that Congress wanted [TCPA] claims to be brought in state court even if they exceeded $ 75,000 and involved diverse parties," but finding diversity jurisdiction inapplicable due to failure to satisfy amount in controversy requirement).

Plaintiffs would have this Court ignore these well-reasoned opinions. First, plaintiffs argue that [**14] § 1332 is no "less a general jurisdictional statute than § 1331," implying that if Congress's statements regarding exclusive jurisdiction were enough to defeat jurisdiction under § 1331, that language also must be sufficient to defeat jurisdiction under § 1332. (Pls. Mem. Supp. Mot. Remand at 8; Pls. Reply Mem. Supp. Mot. Remand at 3-4.) This argument ignores the fact that "rather than granting jurisdiction on the basis of federal law, § 1332 is an independent grant of jurisdiction designed to prevent discrimination against out-of-state defendants regardless of whether federal law is involved." [*534] *See Biggerstaff,* 221 F. Supp. 2d at 656 (citing *Erie R. Co. v. Tompkins,* 304 U.S. 64, 74, 58 S. Ct. 817, 82 L. Ed. 1188 (1938)). As the District Court for the District of Columbia reiterated:

> [HN6] The diversity jurisdiction statute is not a general jurisdictional grant nor is it akin to Section 1331 providing for the federal question jurisdiction. Rather, diversity jurisdiction, expressly contemplated by Article III of the United States Constitution, is an independent basis for federal jurisdiction created to prevent discrimination against non-resident defendants regardless of whether [**15] federal law is involved.

Kopff, 298 F. Supp. 2d at 55 (citing *Erie,* 304 U.S. at 74). Accordingly, plaintiffs' attempt at dissolving the distinction between federal question jurisdiction and diversity jurisdiction is unpersuasive.

So is plaintiffs' second line of argument, which asserts that Congress clearly indicated through the TAPA's statutory language that state courts have exclusive jurisdiction over private causes of action. (Pls. Mem. Supp. Mot. Remand at 9 (citing *Foxhall,* 156 F.3d at 432); Pls. Reply Mem. Supp. Mot. Remand at 4-5 (citing *Gottlieb v. Carnival Corp.,* 367 F. Supp. 2d 301, 309 (E.D.N.Y. 2005)).) However, no express rejection of diversity jurisdiction can be found in the TCPA. *See Accounting Outsourcing,* 294 F. Supp. 2d at 838 (noting that "it would take a much more clear and definitive statement from Congress to convince this court to remove a party's entitlement to a federal forum based on diversity"); *see id.* (citing two statutory examples of an express rejection of diversity jurisdiction but commenting that "although such statutes are not unprecedented, they are [**16] indeed rare"). In addition, "[a] federal court's original jurisdiction in diversity cases is not subject to implied exceptions." *Kopff,* 298 F. Supp. 2d at 55.

Also, this Court finds persuasive--as have other federal district courts--the analysis in *Kinder,* which reasoned that

> in those actions where diversity of citizenship properly exists, Plaintiff's interpretation of the TCPA would create the anomalous result that state law claims based on unlawful telephone calls could be brought in federal court, while federal TCPA claims based on those same calls could be heard only in state court. Such an interpretation would also undermine the purposes of supplemental jurisdiction by requiring parties who bring TCPA claims along with other federal claims to maintain separate, parallel actions in state and federal court.

2000 U.S. Dist. LEXIS 13853, 2002 WL 1409762, at *4. "This argument alone is reason enough to allow TCPA claims to be litigated in federal courts based on diversity jurisdiction, one court concluded, since 'if the exact same claims, brought pursuant to state law, may be litigated in federal court on diversity of the parties, it makes little sense to preclude [**17] a TCPA claim.'" *Saporito I,* slip op. at 8 (quoting *Accounting Outsourcing,* 294 F. Supp. 2d at 837-38).

This interpretation is consistent with the purposes of the TCPA, as reflected in the Act's legislative history. *See Accounting Outsourcing,* 294 F. Supp. 2d at 837 ("One of the main reasons the TCPA was interpreted by the circuit courts to exclude federal question jurisdiction was because state courts provide a more appropriate forum for small value claims and plaintiffs appearing on their own behalf." (citing *Inacom,* 106 F.3d at 1152-53 (in turn citing the congressional record and the statements of Senator Hollings))). Plaintiffs quote the statement of Senator Hollings that "the bill does not, because of constitutional restraints, dictate to the states which

court in each state shall be the proper venue for such action" in support of [*535] the proposition that state courts of general jurisdiction with no monetary limitations have jurisdiction over such actions. (Pls. Mem. Supp. Mot. Remand at 10-11 (citing statements of Senator Hollings).) However, plaintiffs themselves qualify this statement: "Senator Hollings only mentioned his hope [**18] that states would allow such actions to be brought in small claims court because he wished that consumers who had a limited number of claims would be able to bring these claims under the TCPA in the most user friendly forum possible." (*Id.* at 11.) Accordingly, these statements in no way negate the reason behind diversity jurisdiction: preventing discrimination against out-of-state defendants. *See Kopff,* 298 F. Supp. 2d at 55 (citing *Erie,* 304 U.S. at 74); *see also Biggerstaff,* 221 F. Supp. 2d at 656 (citing *Erie,* 304 U.S. at 64).

Plaintiffs' arguments are not bolstered by their reliance on two recent federal district court decisions--*Gottlieb v. Carnival Corp.,* 367 F. Supp. 2d 301, and *Consumer Crusade, Inc. v. Fairon & Assocs.,* 379 F. Supp. 2d 1132, No. 05-CV-00853-PSF-MJW, 2005 WL 1793447 (D. Colo. July 28, 2005)--finding that diversity jurisdiction cannot operate to grant federal courts jurisdiction over TCPA claims. Both cases take a fundamentally different tack on interpreting the "exclusive jurisdiction" language, one with which this Court, respectfully, disagrees. In *Consumer Crusade,* [**19] the court observes that because the TCPA grants exclusive jurisdiction to the states, a TCPA claim cannot originally be brought in federal court; therefore, § 1332 cannot provide a basis for original jurisdiction in federal court. 379 F. Supp. 2d 1132, 2005 WL 1793447, at *4-5. The court justifies its position by relying heavily on *Gottlieb. See id.* In *Gottlieb,* the court stated:

> When, in *Foxhall,* the Court held that state courts have *exclusive jurisdiction* over a cause of action created by the TCPA . . . it must be assumed that it used its words carefully and advisedly. Being conscious of the admonition against making a fortress out of the dictionary, the word "exclusively" requires no definition. To conclude that when courts of appeal used the word "exclusively" to mean it does not apply to diversity jurisdiction is to conclude that "exclusively" means "exclusively" except when it does not and would be reminiscent of the colloquy between Humpty Dumpty and Alice:
>
> > "when I use a word," Humpty Dumpty said, . . . "it means just what I choose it to mean--neither more nor less." "The question is," said Alice, "whether you *can* make words mean so many different [**20] things."
>
> Lewis Carroll, *Through the Looking Glass,* Ch. VI.

Gottlieb, 367 F. Supp. 2d at 309.

However, this Court agrees with Chief Judge Korman's assessment of *Gottlieb* and its reliance on *Foxhall:*

> "If the language [on exclusive jurisdiction] is taken out of context, it certainly . . . would seem to indicate that federal courts could never hear claims under the TCPA." But plainly, the meaning of the word "exclusive" as used in *Foxhall* can only be ascertained by reading the term in context. Simply put, because diversity jurisdiction was not raised in *Foxhall,* the use of the word "exclusive" in that case must be understood to mean that, as between state and federal courts, state courts have exclusive jurisdiction.

Saporito v. Vision Lab Telecomms., Inc., No. 05-CV-1007, slip op. at 4-5 (E.D.N.Y. July 8, 2005) (*"Saporito II"*) (quoting *Saporito I,* slip op. at 4 (citation omitted)). *Foxhall* did not address diversity jurisdiction, nor did the opinion indicate whether the requirements for diversity were met. While in *Gottlieb* Judge Glasser concedes that *Foxhall* did not discuss diversity, he [*536] observed [**21] that the parties were diverse. However, *Foxhall* is silent regarding the amount in controversy. *Consumer Crusade* incorrectly states, based on Judge Glasser's opinion, that *Foxhall* "involved a diversity fact pattern." 379 F. Supp. 2d 1132, 2005 WL 1793447, at *5. Even if it did, the Second Circuit's opinion did not address diversity or its effects on the decision to remand for lack of federal question jurisdiction. [HN7] Where the requirements of § 1332 are met, this Court sees no reason to interpret the TCPA to preclude the jurisdiction of the federal courts. *See Kopff,* 298 F. Supp. 2d at 55 (citing *Erie,* 304 U.S. at 74); *see also Biggerstaff,* 221 F. Supp.

2d at 656 (citing *Erie,* 304 U.S. at 64). "Moreover, it is clear that Congress recognized the advantages of litigating such large TCPA cases in federal court, since Congress determined that the litigation of TCPA cases brought by state attorneys general or the F.C.C. should take place exclusively in the federal courts." *Saporito II,* slip op. at 5 (citing 47 U.S.C. § 227(f)(2)).

Accordingly, plaintiffs' motion to remand is denied.

[**22] **II. Plaintiffs' Request for Interlocutory Appeal**

[HN8] A federal district court may permit an interlocutory appeal if it finds that: (1) the order "involves a controlling question of law," (2) "as to which there is substantial ground for difference of opinion," and that (3) "appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). The trial judge has substantial discretion in deciding whether or not to certify, *see D'Ippolito v. Cities Serv. Co.,* 374 F.2d 643, 649 (2d Cir. 1967), and the court should construe the requirements for certification strictly. *See Klinghoffer v. S.N.C. Achille Lauro,* 921 F.2d 21, 25 (2d Cir. 1990). Indeed, certification is warranted only where exceptional circumstances exist. *See id.* at 24-25; *see also Abortion Rights Mobilization, Inc. v. Regan,* 552 F. Supp. 364, 366 (S.D.N.Y. 1982). As courts have noted:

> [HN9] Leave to appeal from interlocutory orders should be granted only in "exceptional circumstances" because to do otherwise would "contravene the well-established judicial policy of discouraging interlocutory [**23] appeals and avoiding delay and disruption which results from such piecemeal litigation."

In re Ionosphere Clubs Inc., 179 B.R. 24, 28 (S.D.N.Y. 1995) (quoting *Escondido Mission Vill. v. Best Prods. Co., Inc.,* 137 B.R. 114, 116 (S.D.N.Y. 1992)).

We agree with plaintiffs that the jurisdictional issue in this case is controlling. *See Klinghoffer,* 921 F.2d at 24 (stating "it is clear that [HN10] a question of law is 'controlling' if reversal of the district court's order would terminate the action," using subject matter jurisdiction as an example).

"An immediate appeal is considered to advance the ultimate termination of the litigation if that 'appeal promises to advance the time for trial or to shorten the time required for trial.'" *In re Oxford Health Plans, Inc.,* 182 F.R.D. 51, 53 (S.D.N.Y. 1998) (quoting 16 CHARLES A. WRIGHT & ARTHUR MILLER, *Federal Practice and Procedure* § 3930 p. 432 (2d ed. 1996)). Chief Judge Korman accurately summarized the issues presented under this factor:

> If the Second Circuit determined, as did Judge Glasser, that diversity jurisdiction cannot provide a basis for hearing TCPA [**24] claims in federal court, this case would have to be promptly remanded to state court, terminating the litigation in federal court. . . . On the other hand, if the Second Circuit were to affirm . . . and hold that diversity jurisdiction provides a proper basis to hear [*537] TCPA claims in federal court, an interlocutory appeal would not advance the termination of this litigation, since after the appeal the case would simply resume in district court.

Saporito II, slip op. at 8. Although an interlocutory appeal could delay resolution of this process, it could prevent an even greater delay and much wasted expense. Proceeding with the case where the possibility exists that this Court lacks jurisdiction could force plaintiffs to try this case twice, once in federal court and again in state court. Such a scenario violates the spirit of the TCPA. Consequently, we are inclined to weigh this factor in favor of granting the interlocutory appeal.

However, "the mere presence of a disputed issue that is a question of first impression, standing alone, is insufficient to demonstrate a substantial ground for difference of opinion." *In re Flor,* 79 F.3d 281, 284 (2d Cir. 1996). [**25] Plaintiffs argue forcefully that the fact that two distinguished judges in our sister Eastern District--Chief Judge Korman and Judge Glasser--have reached opposite conclusions on the issue of diversity jurisdiction of TCPA claims clearly establishes that there is a substantial ground for difference of opinion on the issue. (Pls. Reply Mem. Supp. Mot. Remand at 10.) We agree. Indeed, we note that Chief Judge Korman certified his ruling in *Saporito II* for interlocutory appeal. However, for reasons we do not know, the plaintiff did not pursue such an appeal. *See Saporito v. Vision Lab Telecomms., Inc.,* No. 05-CV-1007, slip op. at 2 (E.D.N.Y. Sept. 28, 2005) (*"Saporito III"*).

Accordingly, plaintiffs' request for certification is granted. In the interest of judicial efficiency, the present proceeding is stayed, aside from discovery, while this Court awaits a definitive ruling on the jurisdictional question from the Second Circuit. Even if that ruling results in a remand of this action to state court, the dis-

covery accomplished in the meantime will be equally useful in that forum.

III. Defendant's Motion to Dismiss

As the parties have fully briefed the issues [**26] presented by defendant's motion to dismiss, and because the decision on those issues will affect the scope of discovery, this Court presently will rule on defendant's motion.

[HN11] On a motion to dismiss pursuant to FED. R. CIV. P. 12(b)(6), the issue is "whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes,* 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974), *overruled on other grounds by Davis v. Scherer,* 468 U.S. 183, 104 S. Ct. 3012, 82 L. Ed. 2d 139 (1984). A complaint should not be dismissed for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Padavan v. United States,* 82 F.3d 23, 26 (2d Cir. 1996) (quoting *Hughes v. Rowe,* 449 U.S. 5, 10, 101 S. Ct. 173, 66 L. Ed. 2d 163 (1980)). [HN12] Generally, "conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." 2 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 12.34[1][b] (3d ed. 1997); *see also Hirsch v. Arthur Andersen & Co..,* 72 F.3d 1085, 1088 (2d Cir. 1995). [**27] Allegations that are so conclusory that they fail to give notice of the basic events and circumstances of which plaintiff describes, are insufficient as a matter of law. *See Martin v. N.Y. State Dep't of Mental Hygiene,* 588 F.2d 371, 372 (2d Cir. 1978). [HN13] On a motion to dismiss pursuant to Rule 12(b)(6), a court must accept as true all of the well-pleaded facts and consider those facts in the light most favorable to the plaintiff. *See Hertz Corp. v. City of New York,* 1 F.3d 121, 125 (2d [*538] Cir. 1993); *In re AES Corp. Sec. Litig.,* 825 F. Supp. 578, 583 (S.D.N.Y. 1993) (Conner, J.).

Defendant asserts that plaintiffs' claims should be dismissed because (1) violations of 47 C.F.R. § 68.318(d) are not actionable under the TCPA, (2) the TCPA preempts plaintiffs' state law claims, which all relate to interstate facsimile transmissions, and (3) plaintiffs' request for attorney's fees is not authorized by either the federal or state statutes at issue in this case.

A. Violations of 47 C.F.R. § 68.318(d)

Defendant argues that plaintiffs cannot bring individual causes of action under [**28] § 227(b) for violations of regulation § 68.318(d). Plaintiffs' Complaint charges defendant with three violations of that regulation per fax for failing in its faxes to: (1) with one exception, identify the business, other entity, or individual that sent the faxes; (2) with one exception, clearly indicate the telephone number of the sending machine; and (3) clearly indicate the name of the fax broadcaster under which the fax broadcaster was registered to conduct business. (V. Complt. PP12, 19, 27, 38, 46.) Defendant asserts that the regulations at issue were not promulgated pursuant to § 227(b), but rather § 227(d)(1)(B), governing technical and procedural standards, and that no cause of action for such violations exists under § 227(b) because such violations are reserved for prosecution by the F.C.C. or state attorneys general. (Def. Mem. Supp. Mot. Dismiss at 6-8; Def. Reply Mem. Supp. Mot. Dismiss at 3, 5.) Plaintiffs contend that their claims for § 68.318(d) violations are actionable under § 227(b) in order to enable recipients of unsolicited fax advertisements to identify the sending party so that a lawsuit can be filed against the proper offending sender. (Pls. Mem. Opp. [**29] Mot. Dismiss at 1, 9.)

Section 227(d)(1)(B) states:

> [HN14] It shall be unlawful for any person within the United States --
>
> (B) to use a computer or other electronic device to send any message via a telephone facsimile machine unless such person clearly marks, in a margin at the top or bottom of each transmitted page of the message or on the first page of the transmission, the date and time it is sent and an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity, or individual.

The regulation at issue, § 68.318(d), incorporates language identical to § 227(d) before adding language pertaining to fax broadcasters and fax machines:[HN15]

> Additional limitations.
>
> (d) Telephone facsimile machines; Identification of the sender of the message. It shall be unlawful for any person within the United States to use a computer or other electronic device to send any message via a telephone facsimile machine unless such person clearly marks, in a margin at the top or bottom of each transmitted page of the message or on the first page of the transmission, the date and time [**30] it is sent and an identification

> of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity, or individual. If a facsimile broadcaster demonstrates a high degree of involvement in the sender's facsimile messages, such as supplying the numbers to which a message is sent, that broadcaster's name, under which it is registered to conduct business with the State Corporation Commission (or comparable regulatory authority), must be identified on the facsimile, along with the sender's name. Telephone facsimile machines manufactured on and after December 20, 1992, must clearly mark such identifying [*539] information on each transmitted page.

47 C.F.R. § 68.318(d).

Although no independent cause of action exists for violations of § 227(d), *see Lary v. Flasch Bus. Consulting,* 878 So. 2d 1158, 1165 (Ala. Civ. App. 2003) ("Congress did not authorize private citizens to bring actions to impose penalties for or recover damages allegedly flowing from violations of subsection (d) of that statute."); *see also Missouri ex rel. Nixon v. Am. Blast Fax, Inc.,* 323 F.3d 649, 652 n.2 (8th Cir. 2003) [**31] (noting district court's dismissal of § 227(d) claims); *Condon v. Office Depot, Inc.,* 855 So. 2d 644, 645 n.1 (Fla. Dist. Ct. App. 2003) (noting trial court's holding that § 227(d) did not allow private right of action), plaintiffs instead allege violations under § 68.318(d). Whether plaintiffs are entitled to bring claims for violations of regulations implemented under § 68.318(d) is an issue of first impression in this district.

Defendant argues that § 68.318(d) was promulgated under § 227(d), and, therefore, does not permit a private cause of action for technical violations. Plaintiffs contend the regulation was issued under § 227(b), and is, therefore, actionable. Defendant believes that a mere citation to § 227(d)(1)(B) in the Final Rule, *see* 68 F.R. 44144, provides sufficient basis for finding the regulation was promulgated under the authority of that subsection. n3 The Final Rule, in the same paragraph that defendant cites, states that the purpose behind the identification regulations is to "permit consumers to hold fax broadcasters accountable for unlawful fax advertisements when there is a high degree of involvement on the part of [**32] the fax broadcaster." *Id.* Section 68.318(d), by requiring faxes to contain certain identifying information, better enables consumers to identify the proper parties against whom private rights of action under the TCPA should be brought. But it does not, as plaintiffs contend, make it "absolutely clear that the regulation must have been promulgated pursuant to . . . § 227(b)." n4 (Pls. Mem. Opp. Mot. Dismiss at 4-5.) This Court cannot understand how language governing technical fax requirements in § 227(d), a section that contains no language permitting a private right of action, suddenly bestows a private right of action when it is redrafted into an F.C.C. regulation that fails explicitly to identify the subsection under whose authority it was promulgated. n5

> n3 *See Adler v. Vision Lab Telecomms., Inc.,* No. CIV.A.05-0003, 2005 WL 2621984, at *2 (D.D.C. Oct. 17, 2005) ("The regulations cited by plaintiffs, however, were issued pursuant to a directive in § 227(d)."); *see also Saporito III,* slip op. at 4-5 ("It is clear from the language of § 227(d) that the FCC must have relied on § 227(d) when promulgating 47 C.F.R. § 68.318(d)."). We do not find that the citation in the Final Rule carries the same weight as these courts. Nevertheless, we arrive at the same conclusion through different reasoning.

[**33]

> n4 Nor is plaintiffs' argument that § 68.318(d) falls under § 227(b) because the F.C.C. had authority to make regulations and cited § 227 in its entirety as authority for so making this regulation a convincing one. (Pls. Mem. Opp. Mot. Dismiss at 6-8.) Defendant does not challenge the F.C.C.'s authority to make this, or any, regulation in furtherance of the TCPA. Rather, defendant challenges the ability of plaintiffs to bring a private right of action under the regulations.

> n5 Equally as curious is why plaintiffs also have not alleged a violation of the last sentence of § 68.318(d) for failure of a fax machine manufactured after December 20, 1992, to supply identifying information on each transmittal page. Plaintiffs' reasoning appears to lead to the conclusion that plaintiffs are entitled to the statutory remedy of $ 500 for each page on which a post-1992 fax machine failed to print the required information, since this requirement would also aid identification of the sender.

The TCPA empowered citizens to sue for relief from the problem created by [*540] the *receipt* of unsolicited fax [**34] advertisements, not for deficiencies in the faxes received. *See Adler,* 2005 WL 2621984, at *2. The

TCPA provides for injunctive and compensatory relief in order to stop and/or compensate the plaintiff for the annoyance, the conversion of paper and ink and the effective preemption of his fax machine during the intervals when it is receiving advertisement transmissions. *See Kim v. Sussman,* No. 03 CH 07663, 2004 WL 3135348, at *1 (Ill. App. Ct. Oct. 14, 2004) ("The TCPA . . . was intended to address the nuisance posed to individuals and businesses by the receipt of unsolicited fax transmissions."); *see also* H.R. Report No. 317, 102d Cong, 1st Sess., at 10 ("The fax advertiser takes advantage of this basic design by sending advertisements to available fax numbers, knowing that it will be received and printed by the recipient's machine. This type of telemarketing is problematic for two reasons. First, it shifts some of the costs of advertising from the sender to the recipient. Second, it occupies the recipient's facsimile machine so that it is unavailable for legitimate business messages while processing and printing the junk fax."). True, the technical [**35] and procedural standards are designed to make it easier to identify the offending sender. However, [HN16] under the TCPA, it is the province of the state attorneys general and the F.C.C. to sue fax broadcasters for technical violations. *See* 47 U.S.C. § 227(f)(1), (7); 47 U.S.C. § 503(b)(1), (5). It is not the province of the court to add private rights of action not clearly authorized by Congress. *See Alexander v. Sandoval,* 532 U.S. 275, 286-87, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001) (stating "private rights of action to enforce federal law must be created by Congress" and in the absence of statutory intent to create a private right and remedy, "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute"). Nothing in the legislative history indicates an intent on the part of Congress to turn each annoyed fax recipient into an individual F.C.C. enforcer. Nor would such a result, even if intended, likely put a stop to faxed advertisements; the advertising transmissions would merely be a few lines longer. n6 We are not persuaded by plaintiffs' claim that "there [**36] is a growing consensus among courts from different states that violations of the identification requirements under § 68.318(d) are actionable under 47 U.S.C. § 227(b)." (Pls. Mem. Opp. Mot. Dismiss at 10 (citing *Schraut v. Rocky Mtn. Reclamation,* 2001 TCPA Rep. 1182 (Mo. Cir. Dec. 18, 2001) (Bellin Decl., Ex. A); *Sterling Realty Co. v. Klein,* 2005 TCPA Rep. 1353 (N.J. Super. Mar. 21, 2005) (Bellin Decl., Ex. B); *McKenna v. Accurate Comp. Servs., Inc.,* 2002 TCPA Rep. 1135 (Colo. Dist. Feb. 24, 2003) (Bellin Decl., Ex. C).) Nor do we find convincing the justification, if any, that these cases provide. Allowing separate recovery for each and every technical violation alleged would create a windfall for plaintiffs clearly not in the contemplation of Congress. As Senator Hollings, the bill's sponsor, stated, "Small claims court or a similar court would allow the consumer to appear before the court without an attorney. *The amount of damages in this legislation is set to be fair to both the consumer and the telemarketer."* 137 Cong. Rec. S16205 (Nov. 7, 1991) (emphasis added).

> n6 Under 47 C.F.R. § 1.80(b)(3), the F.C.C. can impose penalties of $ 11,000 for regulation violations, compared to the $ 500 plaintiffs assert that they can claim.

[**37]

Accordingly, defendant's motion to dismiss is granted with respect to plaintiffs' claims under 47 C.F.R. § 68.318(d). n7

> n7 Dismissal of the § 68.318(d) claims reduces the amount of damages potentially recoverable, but not below the $ 75,000 amount in controversy requirement under § 1332.

[*541] **B. New York State Anti-Fax Law**

[HN17] Federal law can preempt state law with an express statement from Congress, without an express statement when the federal statute implies an intention to preempt state law or when state law directly conflicts with federal law. *See N.Y. Conference of Blue Cross v. Travelers Ins.,* 514 U.S. 645, 654, 115 S. Ct. 1671, 131 L. Ed. 2d 695 (1995); *Green Mountain R.R. Corp. v. Vermont,* 404 F.3d 638, 641 (2d Cir. 2005). Courts addressing claims of preemption start from the presumption that Congress does not intend to supplant state law. *See N.Y. Conference,* 514 U.S. at 654. "Congress' intent . . . primarily is discerned from the language of the preemption [**38] statute and the 'statutory framework' surrounding it." *Medtronic, Inc. v. Lohr,* 518 U.S. 470, 486, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996) (citing *Gade v. Nat'l Solid Wastes Mgmt. Ass'n,* 505 U.S. 88, 111, 112 S. Ct. 2374, 120 L. Ed. 2d 73 (1992)). This includes the "'structure and purpose of the statute as a whole,' as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law." *Id.* (quoting *Gade,* 505 U.S. at 98).

Section 227(e)(1) of the TCPA states:

> [HN18] Nothing in this section or the regulations prescribed under this section shall preempt any State law that imposes

more restrictive intrastate requirements or regulations on, or which prohibits --

> (A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements . . . .

Defendant asserts that the TCPA preempts N.Y. GEN. BUS. LAW § 396-aa because the New York State statute cannot apply to the regulation of *interstate* fax transmissions. n8 (Def. Mem. Supp. Mot. Dismiss at 8.) Plaintiffs contend that [**39] the state statute applies to both interstate and intrastate faxes. Therefore, this Court must decide whether plaintiffs' claims based on interstate faxes are permissible under N.Y. GEN. BUS. LAW § 396-aa. n9

n8 Neither plaintiffs' Complaint nor their briefing papers allege that defendant sent any intrastate faxes.

n9 The text of N.Y. GEN. BUS. LAW § 396-aa reads:

> [HN19] 1. It shall be unlawful for a person, corporation, partnership or association to initiate the unsolicited transmission of telefacsimile messages promoting goods or services for purchase by the recipient of such messages. For purposes of this section, "telefacsimile" shall mean every process in which electronic signals are transmitted by telephone lines for conversion into written text. This section shall not apply to telefacsimile messages sent to a recipient with whom the initiator has had a prior contractual or business relationship nor shall it apply to transmissions not exceeding five pages received between the hours of 9:00 P.M. and 6:00 A.M. local time. Notwithstanding the above, it shall be unlawful to initiate any telefacsimile message to a recipient who has previously sent a written or telefacsimile message to the initiator clearly indicating that the recipient does not want to receive telefacsimile messages from the initiator.
>
> 2. Any person who has received a telefacsimile transmission in violation of this section may bring an action in his own name to recover his actual damages or one hundred dollars, whichever is greater.

[**40]

While "Congress authorized the states to adopt legislation containing '*more restrictive intrastate* requirements or regulations,' . . . nothing in the TCPA purports to authorize the states to adopt *less restrictive* regulations governing *interstate* [*542] commerce." *Consumer Crusade, Inc. v. Affordable Health Care Solutions, Inc.*, 121 P.3d 350, No. 04CA1839, 2005 WL 2046057, at *7 (Colo. Ct. App. Aug. 25, 2005) (Criswell, J., concurring) (emphasis in original). The legislative history of the TCPA illustrates that Congress recognized the need to restrict interstate communications because the states lacked jurisdiction to do so. Congress found that "over half the states now have statutes restricting various uses of the telephone for marketing, but telemarketers can evade their prohibitions through interstate operations; therefore, federal law is needed to control residential telemarketing practices." Pub. L. No. 102-243 § 2(7), 105 Stat. 2394 (1991); *see also* Sen. R. No. 102-178 at 3 (1991) ("States do not have jurisdiction over the interstate calls. Many states have expressed a desire for federal legislation to regulate interstate telemarketing calls to supplement their [**41] restrictions on intrastate calls"); Sen. R. No. 102-178 at 5 ("Federal action is necessary because states do not have the jurisdiction to protect their citizens against those who use these machines to place interstate telephone calls"). "Courts recognize that Congress enacted the TCPA to supplement similar state legislation to protect the privacy interests of residential phone subscribers against unwanted interstate phone and facsimile solicitations *'because states do not have jurisdiction over interstate calls.'" Gottlieb,* 367 F. Supp. 2d at 310 (quoting *Foxhall,* 156 F.3d at 437) (emphasis in original) (collecting cases).

While plaintiffs correctly observe that § 396-aa does not expressly preclude its applicability to interstate faxes, (Pls. Mem. Opp. Mot. Dismiss at 19-20), this Court is persuaded to follow Judge Glasser's opinion in *Gottlieb,* which held that [HN20] § 396-aa applies only to intrastate communications "in view of Congress's intent that the TCPA extend the reach of state laws by regulating interstate communications." *Gottlieb,* 367 F. Supp. 2d at 311. Therefore, defendant's motion to dis-

miss plaintiffs' claims under [**42] § 396-aa is granted; plaintiffs have failed to state a claim upon which relief can be granted under New York law because the Complaint fails to allege that defendant, a Florida corporation with its principal place of business in Miami Beach, Florida, sent plaintiffs any intrastate faxes.

C. Attorney's Fees

Defendant's motion to dismiss plaintiffs' claim for attorney's fees is also granted. Defendant rightly notes that absent explicit congressional authorization, attorney's fees are generally not recoverable. *See, e.g., Key Tronic Corp. v. United States,* 511 U.S. 809, 814, 114 S. Ct. 1960, 128 L. Ed. 2d 797 (1997). [HN21] The TCPA makes no provision for attorney's fees or costs. *See J.C. Corp. Mgmt., Inc. v. Resource Bank,* No. 4:05CV00716, 2005 WL 2206096, at *4 (E.D. Mo. Sept. 12, 2005); *Gold Seal,* 2003 U.S. Dist. LEXIS 11205, 2003 WL 21508177, at *4. The relatively few state cases that have permitted recovery of attorney's fees did so pursuant to specific authorizations in state statutes, authorizations that are not contained in the New York State statute--which, as noted above, is inapplicable to this case in any event. *See Jemiola v. XYZ Corp.,* 2003 Ohio 7321, 802 N.E.2d 745, 750 (Ohio Ct. Cl. 2003). [**43] Consequently, plaintiffs are not entitled to seek attorney's fees.

CONCLUSION

For all of the foregoing reasons, plaintiffs' motion to remand is denied and defendant's motion to dismiss certain of plaintiffs' claims is granted, thereby dismissing plaintiffs' claims for: (1) Telephone Consumer Protection Act ("TCPA") violations of 47 C.F.R. § 68.318(d), set forth in the Complaint at paragraph 38(2)-(4); (2) N.Y. GEN. BUS. LAW § 396-aa violations, set forth in the Complaint at paragraphs 36, 42-44 and 50-52; and (3) attorney's [*543] fees. In addition, plaintiffs' request for interlocutory appeal is granted. The case is stayed, excepting discovery, until the Court of Appeals for the Second Circuit renders a decision on the federal district courts' subject matter jurisdiction over TCPA claims.

SO ORDERED.

Dated: White Plains, New York

November 18, 2005

William C. Conner

Sr. United States District Judge

LEXSEE 2006 U.S. APP. LEXIS 2677

SHERMAN GOTTLIEB, Plaintiff-Appellant, v. CARNIVAL CORPORATION, Defendant-Appellee.

Docket No. 05-2733-cv

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

2006 U.S. App. LEXIS 2677

December 19, 2005, Argued
February 3, 2006, Decided

PRIOR HISTORY: [*1] Plaintiff-appellant Sherman Gottlieb appeals from a judgment of the United States District Court for the Eastern District of New York dismissing his claims under the Telephone Consumer Protection Act, 47 U.S.C. § 227, for lack of subject matter jurisdiction and dismissing his parallel state law claims under New York General Business Law § 396-aa for lack of supplemental jurisdiction. We hold that federal courts have diversity jurisdiction over private causes of action brought under § 227. Gottlieb v. Carnival Corp., 367 F. Supp. 2d 301, 2005 U.S. Dist. LEXIS 7474 (E.D.N.Y., 2005)

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant consumer challenged a decision from the United States District Court for the Eastern District of New York, which dismissed his claim against defendant company under the Telephone Consumer Protection Act (TCPA), 47 U.S.C.S. § 227 et seq., and a state law claim for lack of jurisdiction.

OVERVIEW: The consumer received a large amount of fascimiles from the company relating to advertisements. Thereafter, the consumer filed an action under the TCPA and state law. The district court dismissed the case, and the consumer sought review. In vacating the dismissal, the appellate court determined that the district court erred by finding that it lacked jurisdiction over the action. Although the decision in Foxhall held that federal courts lacked federal question jurisdiction under 28 U.S.C.S. § 1331 over claims under the TCPA, this decision was not dispositive on the issue of diversity jurisdiction under 28 U.S.C.S. § 1332. Nothing in the TCPA expressly divested federal courts of diversity jurisdiction over private actions under the TCPA. Moreover, nothing in § 1332 indicated that diversity jurisdiction did not exist where federally-created causes of action were concerned. Because the district court erred in finding a lack of jurisdiction under the TCPA, a refusal to exercise supplemental jurisdiction was improper as well.

OUTCOME: The decision was vacated, and the case was remanded for further proceedings.

LexisNexis(R) Headnotes

Communications Law > Federal Acts > Telephone Consumer Protection Act
[HN1] The Telephone Consumer Protection Act, 47 U.S.C.S. § 227 et seq., prohibits, inter alia, the use of any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement absent certain conditions. 47 U.S.C.S. § 227(b)(1)(C). Section 227(b)(3) provides a private right of action under the statute and states that a person or entity may, if otherwise permitted by the laws or rules of court of a state, bring in an appropriate court of that state an action for injunctive relief or damages. Section 227(b)(3) further establishes damages of $ 500 for each violation of the statute and treble damages if the defendant violates the statute willfully or knowingly.

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Federal Question Jurisdiction
Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Action
Communications Law > Federal Acts > Telephone Consumer Protection Act
[HN2] State courts have "exclusive" jurisdiction over private actions under the Telephone Consumer Protection Act (TCPA), 47 U.S.C.S. § 227 et seq., and, pursuant to 28 U.S.C.S. § 1331, federal courts lack federal question jurisdiction over such claims. The language of 47 U.S.C.S. § 227(b)(3) provides that a person "may" bring an action in state court. State courts are courts of general jurisdiction, and therefore no express grant of jurisdiction is required to confer concurrent jurisdiction on state and federal courts. By contrast, federal courts are courts of limited jurisdiction which thus require a specific grant of jurisdiction. The permissive authorization in the statute extending only to courts of general jurisdiction is significant. In order to give effect and meaning to every provision of the statute, the United States Court of Appeals for the Second Circuit has joined several other federal courts of appeals and held that Congress intended to confer exclusive state court jurisdiction over private rights of action under the TCPA. The statutory language constitutes a specific expression of congressional intent that trumped the more general grant of federal question jurisdiction in 28 U.S.C.S. § 1331.

Governments > Legislation > Interpretation
[HN3] Statutory analysis begins with the text and its plain meaning, if it has one. If a statute is ambiguous, courts resort to the canons of statutory construction to help resolve the ambiguity. Finally, when the plain language and canons of statutory interpretation fail to resolve statutory ambiguity, courts will resort to legislative history.

Governments > Legislation > Interpretation
[HN4] When determining the meaning of a statutory provision, the text should be placed in the context of the entire statutory structure. A statute is to be considered in all its parts when construing any one of them. Normally, a statute must, if reasonably possible, be construed in a way that will give force and effect to each of its provisions rather than render some of them meaningless. Second, background principles of law in effect at the time Congress passes a statute can be useful in statutory interpretation. Legislation never is written on a clean slate, nor is it ever read in isolation or applied in a vacuum.

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Action
Communications Law > Federal Acts > Telephone Consumer Protection Act
[HN5] See 47 U.S.C.S. § 227(f)(2).

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Action
Communications Law > Federal Acts > Telephone Consumer Protection Act
[HN6] The United States Court of Appeals for the Second Circuit rejects the argument that Congress's failure to provide explicitly for concurrent jurisdiction in 47 U.S.C.S. § 227(b)(3) means that the provision precludes federal courts from exercising diversity jurisdiction over private Telephone Consumer Protection Act, 47 U.S.C.S. § 227 et seq., claims. When used in or to describe federal statutes, the term "concurrent jurisdiction" refers to state-court jurisdiction over cases arising under federal law.

Civil Procedure > Jurisdiction > Diversity Jurisdiction
Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Action
Communications Law > Federal Acts > Telephone Consumer Protection Act
[HN7] It is consistent with both the statutory language and the structure of the Telephone Consumer Protection Act, 47 U.S.C.S. § 227 et seq., and the Communications Act of 1934 to interpret: (1) those provisions of the 1934 Act authorizing concurrent jurisdiction to confer federal question and state-court jurisdiction; (2) § 227(f)(2) to confer exclusive federal jurisdiction over actions brought by the states; and (3) § 227(b)(3) to confer federal diversity and state-court jurisdiction over private claims.

Civil Procedure > Jurisdiction > Diversity Jurisdiction
Communications Law > Federal Acts > Telephone Consumer Protection Act
[HN8] Nothing in 28 U.S.C.S. § 1332 limits its application to state-law causes of action; in fact, the diversity statute gives federal courts original jurisdiction "of all civil actions" where there is diversity of citizenship and the amount-in-controversy requirement is satisfied. § 1332(a). The United States Court of Appeals for the Second Circuit thus rejects the argument that federally-created causes of action do not give rise to diversity jurisdiction. Although the Telephone Consumer Protection Act, 47 U.S.C.S. § 227 et seq., is an anomalous statute, creating a private right of action over which federal courts lack federal question jurisdiction, nothing in § 1332 indicates that diversity jurisdiction does not exist where federally-created causes of action are concerned. Moreover, the usual admonition that the diversity statute must be strictly construed against intrusion on the right of state courts to decide their own controversies is not relevant when a federally-created cause of action is at issue.

Governments > Legislation > Interpretation
[HN9] In the context of statutory interpretation, repeal or amendment by implication is disfavored. In the absence of some affirmative showing of an intent to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable.

Civil Procedure > Jurisdiction > Diversity Jurisdiction
Communications Law > Federal Acts > Telephone Consumer Protection Act
[HN10] 28 U.S.C.S. § 1332 applies to private actions under the Telephone Consumer Protection Act, 47 U.S.C.S. § 227 et seq.

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JUDGES: Before: OAKES, SOTOMAYOR, and WESLEY, Circuit Judges.

OPINIONBY: SOTOMAYOR

OPINION: SOTOMAYOR, *Circuit Judge*:

This case presents the question of whether federal courts have diversity jurisdiction over private causes of action brought under the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227. Plaintiff-appellant Sherman Gottlieb ("Gottlieb") appeals from a judgment of the United States District Court for the [*2] Eastern District of New York (Glasser, J.), entered on May 3, 2005, dismissing his claims under the TCPA for lack of subject matter jurisdiction and dismissing his parallel state law claims for lack of supplemental jurisdiction. Relying primarily on this Court's decision in *Foxhall Realty Law Offices, Inc. v. Telecommunications Premium Services, Ltd.*, 156 F.3d 432 (2d Cir. 1998), where we held that Congress intended to divest the federal courts of federal question jurisdiction over private TCPA claims, the district court concluded that "jurisdiction over TCPA claims resides in the state courts exclusively" and that federal courts lack diversity jurisdiction over such claims. *Gottlieb v. Carnival Corp.*, 367 F. Supp. 2d 301, 307 (E.D.N.Y. 2005). The district court reasoned that "it must be assumed that [the Second Circuit] used its words carefully and advisedly" when we stated in *Foxhall* that state courts have "exclusive jurisdiction" over TCPA claims. *Id.* at 309. Our ruling in *Foxhall*, however, related only to the existence of federal question jurisdiction over private TCPA claims; we did not consider in that case whether [*3] federal courts have diversity jurisdiction over such claims. n1 We hold here that Congress did not divest the federal courts of diversity jurisdiction over private actions under the TCPA. We thus vacate the judgment of the district court and remand the case for further proceedings.

n1 As noted by the district court, *see* 367 F. Supp. 2d at 309, the parties in *Foxhall* had diverse citizenship, but whether the case met the requirements of 28 U.S.C. § 1332 was not before the Court. Moreover, although

the plaintiff in *Foxhall* had filed a putative class action, it alleged in its complaint only that it had received one unsolicited advertisement. 156 F.3d at 434.

BACKGROUND

The following facts are taken from Gottlieb's complaint.

Gottlieb is a travel agent who works from his home in Staten Island, New York. In connection with his work, he has a fax machine associated with two telephone numbers. Between early 2001 and 2004, Gottlieb received, via [*4] his fax machine, over 1000 unsolicited advertisements from Carnival Corporation ("Carnival"), a company organized under the laws of Panama and having its principal place of business in Florida. Gottlieb continued receiving faxes from Carnival even though he sent Carnival written instructions, via facsimile, requesting that they cease sending him unsolicited advertisements. He also contacted the telephone number listed on those advertisements to request that his fax numbers be removed from Carnival's list. In 2002, Carnival began including the following language on the bottom of its faxes: "Carnival does not endorse nor authorize the practice of blast faxing or unsolicited faxing of any materials promoting Carnival or its products."

In Count One of his complaint, n2 Gottlieb seeks statutory damages of $ 500 under the TCPA for each of the approximately 1000 unsolicited fax advertisements he received from Carnival. In Count Two, he alleges that Carnival acted "knowingly and willfully" and seeks treble damages for each statutory violation. In Count Three, he seeks injunctive relief under the TCPA. Finally, in Count Four, Gottlieb seeks statutory damages of $ 100 for each fax sent by [*5] Carnival in violation of New York General Business Law § 396-aa, a parallel New York statute.

n2 All references to the "complaint" are to the amended complaint filed on November 17, 2004.

DISCUSSION

[HN1] The TCPA prohibits, *inter alia*, the "use [of] any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement" absent certain conditions not present here. 47 U.S.C. § 227(b)(1)(C). Section 227(b)(3) provides a private right of action under the statute and states that "[a] person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State" an action for injunctive relief or damages. Section 227(b)(3) further establishes damages of $ 500 for each violation of the statute and treble damages if the defendant violates the statute "willfully or knowingly."

This Court concluded in *Foxhall* that [HN2] state courts have "exclusive" [*6] jurisdiction over private actions under the TCPA and held that, pursuant to 28 U.S.C. § 1331, federal courts lack federal question jurisdiction over such claims. 156 F.3d at 435. We emphasized in *Foxhall* the language of § 227(b)(3) providing that a person "may" bring an action in state court. Central to our reasoning was the fact that state courts are courts of general jurisdiction, and therefore no express grant of jurisdiction is required to confer concurrent jurisdiction on state and federal courts. *Id.* By contrast, "federal courts are courts of limited jurisdiction which thus require a specific grant of jurisdiction." *Id.* We reasoned that the permissive authorization in the statute extending only to courts of general jurisdiction was significant. In order to give effect and meaning to every provision of the statute, we joined several other federal courts of appeals and held that "Congress intended to confer exclusive state court jurisdiction over private rights of action under the TCPA." *Id.* In brief, we concluded that the statutory language constituted a specific expression of congressional intent that trumped the more general [*7] grant of federal question jurisdiction in § 1331. *Id.* at 436.

We did not consider in *Foxhall* whether Congress intended that federal courts have diversity jurisdiction over private TCPA claims. Our discussion of "exclusive jurisdiction" in *Foxhall* must be read in context. *Foxhall* dealt only with federal question jurisdiction; diversity jurisdiction was not raised in *Foxhall*. n3 Our ruling in *Foxhall* thus does not govern the resolution of this case.

n3 To state the obvious, federal courts have subject matter jurisdiction either on the basis of substance, where there is a federal question, or on the basis of citizenship, where the requirements for diversity jurisdiction are satisfied. Our use of the word "exclusive" in *Foxhall* meant only that state courts have exclusive *substance-*

based jurisdiction over private TCPA claims. *Foxhall* did not speak to the existence of citizenship-based, or diversity, jurisdiction.

This case presents a question of statutory construction. [*8] [HN3] Statutory analysis begins with the text and its plain meaning, if it has one. *See Natural Res. Def. Council, Inc. v. Muszynski*, 268 F.3d 91, 98 (2d Cir. 2001). If a statute is ambiguous, we resort to the canons of statutory construction to help resolve the ambiguity. *Id.* Finally, "when the plain language and canons of statutory interpretation fail to resolve statutory ambiguity, we will resort to legislative history." *United States v. Dauray*, 215 F.3d 257, 264 (2d Cir. 2000).

Nothing in § 227(b)(3), or in any other provision of the statute, expressly divests federal courts of diversity jurisdiction over private actions under the TCPA. Because the statute is ambiguous, however, we consider the two canons of statutory construction that are most helpful to our interpretation of the TCPA. First, [HN4] when determining the meaning of a statutory provision, "the text should be placed in the context of the entire statutory structure." *Natural Res. Def. Council*, 268 F.3d at 98. "[A] statute is to be considered in all its parts when construing any one of them." *Dauray*, 215 F.3d at 262 (citation and internal quotation marks [*9] omitted; alteration in original). "Normally, a statute must, if reasonably possible, be construed in a way that will give force and effect to each of its provisions rather than render some of them meaningless." *Allen Oil Co., Inc. v. Comm'r*, 614 F.2d 336, 339 (2d Cir. 1980). Second, "background principles of law in effect at the time Congress passes a statute can be useful in statutory interpretation." *United States v. Kerley*, 416 F.3d 176, 181 (2d Cir. 2005); *see also* 2B NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 53:1 ("Legislation never is written on a clean slate, nor is it ever read in isolation or applied in a vacuum.").

1. *Statutory Structure*

The statutory analyses of the TCPA in earlier cases do not directly pertain to diversity jurisdiction, but they nonetheless inform our interpretation of the statute. Both this Court in *Foxhall and the Fourth Circuit in International Science and Technology Institute, Inc. v. Inacom Communications, Inc.*, 106 F.3d 1146 (4th Cir. 1997), the leading case to have held that courts lack federal question jurisdiction over private TCPA claims, emphasized the statutory [*10] structure of the TCPA and the Communications Act of 1934 ("the 1934 Act"). Both courts found it "significant" that, in § 227(f)(2) of the TCPA, Congress vested "exclusive jurisdiction" in the federal courts over actions brought by state attorneys general on behalf of state residents. n4 *Foxhall*, 156 F.3d at 436; *Int'l Sci.*, 106 F.3d at 1152. The Fourth Circuit noted that "Congress wrote precisely, making jurisdictional distinctions in the very same section of the Act by providing that private actions may be brought in appropriate state courts and that actions by the states must be brought in the federal courts." 106 F.3d at 1152. Section 227(f)(2), however, limits only the jurisdiction of state courts, not the independent jurisdiction of federal courts. Moreover, Congress's explicit investiture of "exclusive jurisdiction" in the federal courts in § 227(f)(2) indicates that in § 227(b)(3), which does not include such language, Congress did not similarly vest categorical, "exclusive" jurisdiction in state courts for private TCPA claims, and therefore did not divest federal courts of both federal question and diversity jurisdiction.

n4 As relevant here, § 227(f)(2) provides that [HN5] "the district courts of the United States . . . shall have exclusive jurisdiction over all civil actions brought under this subsection."

[*11]

Both this Court in *Foxhall* and the Fourth Circuit also found it significant that Congress explicitly provided for concurrent federal and state court jurisdiction in other parts of the 1934 Act, but not in § 227(b)(3). n5 *Foxhall*, 156 F.3d at 436; *Int'l Sci.*, 106 F.3d at 1152. [HN6] We reject the argument that Congress's failure to provide explicitly for concurrent jurisdiction in § 227(b)(3) means that the provision precludes federal courts from exercising diversity jurisdiction over private TCPA claims. When used in or to describe federal statutes, the term "concurrent jurisdiction" refers to state-court jurisdiction over cases arising under federal law. *See Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477-78, 101 S. Ct. 2870, 69 L. Ed. 2d 784 & n.4 (1981) (noting the long-standing rule that state courts have concurrent jurisdiction over federal claims and its importance prior to the creation of general federal-question jurisdiction in 1875); *see also Hathorn v. Lovorn*, 457 U.S. 255, 266, 102 S. Ct. 2421, 72 L. Ed. 2d 824 (1982) (acknowledging the presumption that state courts enjoy concurrent jurisdiction over federal questions). The provisions [*12] of the 1934 Act that establish concurrent jurisdiction do not give any indication of varying from this rule. *See* n.5, *infra*. Thus, Congress's

explicit provision for concurrent jurisdiction in other parts of the 1934 Act concerns the existence of federal question jurisdiction, not diversity jurisdiction, and Congress's failure to provide explicitly for concurrent jurisdiction in § 227(b)(3) has no bearing on its intent with respect to diversity jurisdiction.

n5 The Fourth Circuit identified each of these provisions of the 1934 Act:

> Congress provided explicitly for *concurrent* jurisdiction [in other parts of the Communications Act] when it so intended. *See* 47 U.S.C. § 214(c) (authorizing injunction by *any court of general jurisdiction* for extension of lines or discontinuation of services contrary to certificates of public convenience and necessity); 47 U.S.C. § 407 (authorizing suit *in federal court or state court of general jurisdiction* for common carrier's failure to comply with order of payment); 47 U.S.C. § 415(f) (establishing one-year statute of limitation on suits brought *in federal or state courts* to enforce Commission order for payment of money); 47 U.S.C. § 553(c)(1) (authorizing suit *in federal court or any other court of competent jurisdiction* for unauthorized cable reception); 47 U.S.C. § 555(a) (authorizing suit *in federal court or state court of general jurisdiction* to review actions by franchising authority); 47 U.S.C. § 605(e)(3)(A) (authorizing civil action *in federal court or any other court of competent jurisdiction* for unauthorized publication).

Int'l Sci., 106 F.3d at 1152 (emphasis in original).

[*13]

Just as nothing in the language of § 227(b)(3) expresses a congressional intent to divest the federal courts of diversity jurisdiction under § 1332 over private actions under the TCPA, nothing in the statutory structure indicates that intent. [HN7] It is consistent with both the statutory language and the structure of the TCPA and the 1934 Act to interpret: (1) those provisions of the 1934 Act authorizing concurrent jurisdiction to confer federal question and state-court jurisdiction; (2) § 227(f)(2) to confer exclusive federal jurisdiction over actions brought by the states; and (3) § 227(b)(3) to confer federal diversity and state-court jurisdiction over private claims. We find this to be the most reasonable interpretation of the statute.

2. *Background Principles*

Our conclusion is confirmed by reference to the background principles in effect at the time Congress passed the TCPA. The Supreme Court has indicated that Congress legislates against the backdrop of existing jurisdictional rules that apply unless Congress specifies otherwise. *See Shoshone Mining Co. v. Rutter*, 177 U.S. 505, 506-07, 20 S. Ct. 726, 44 L. Ed. 864 (1900) (holding that where the statute did not [*14] specify which courts had jurisdiction, "it unquestionably meant that the competency of the court should be determined by rules theretofore prescribed in respect to the jurisdiction of the Federal courts"). The question, then, is whether diversity jurisdiction may be presumed to apply to federally-created causes of action unless Congress has made a clear statement otherwise. That is, if diversity jurisdiction is not presumed for federally-created causes of action, the statutory ambiguity in § 227(b)(3) should be resolved by concluding that federal courts do not have diversity jurisdiction over private actions under the TCPA. On the other hand, if § 1332 is an independent grant of federal jurisdiction intended to prevent discrimination against non-citizen parties regardless of whether state or federal substantive law is involved, then diversity jurisdiction is presumed to exist for all causes of action so long as the statutory requirements are satisfied. In that event, § 1332 must itself be explicitly abrogated by Congress, and § 227(b)(3) is not a clear statement of Congressional intent to deprive federal courts of diversity jurisdiction.

A plausible argument against finding diversity [*15] jurisdiction over private TCPA claims is that such jurisdiction is not presumed over rights of action created by federal statutes. Such statutes, the argument goes, typically give rise to federal question jurisdiction and concurrent jurisdiction in the state courts, but not diversity jurisdiction. Where Congress expresses the intent that a federal statute creating a private right of action not give rise to federal question jurisdiction, the argument continues, the only remaining jurisdiction lies in the state courts. Under this analysis, Congress must explicitly state that a federally-created right of action gives rise to diversity jurisdiction; in the absence of such a clear statement, federal jurisdiction will be found lacking if there is no federal question jurisdiction.

While the argument is intriguing, it is not persuasive. [HN8] Nothing in § 1332 limits its application to state-law causes of action; in fact, the diversity statute gives federal courts original jurisdiction "of all civil actions" where there is diversity of citizenship and the amount-in-controversy requirement is satisfied. 28 U.S.C. § 1332(a). We thus reject the argument that federally-created [*16] causes of action do not give rise to diversity jurisdiction. Although the TCPA is an anomalous statute, creating a private right of action over which federal courts lack federal question jurisdiction, nothing in § 1332 indicates that diversity jurisdiction does not exist where federally-created causes of action are concerned. Moreover, the usual admonition that the diversity statute must be strictly construed against intrusion on the right of state courts to decide their own controversies, *see City of Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63, 76-77, 62 S. Ct. 15, 86 L. Ed. 47 (1941), is not relevant when a federally-created cause of action is at issue. Thus, we see no reason to resolve the statutory ambiguity by finding diversity jurisdiction not to exist in this case.

We think the better course is to proceed according to the rule that § 1332 applies to all causes of action, whether created by state or federal law, unless Congress expresses a clear intent to the contrary. Understanding § 1332 to apply presumptively to all causes of action, we acknowledge the well-established principle of statutory construction that [HN9] repeal or amendment by implication is disfavored. *See,* [*17] *e.g.*, *Colo. River Water Conserv. Dist. v. United States*, 424 U.S. 800, 808, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976); *Rosencrans v. United States*, 165 U.S. 257, 262, 17 S. Ct. 302, 41 L. Ed. 708 (1897) ("When there are statutes clearly defining the jurisdiction of the courts, the force and effect of such provisions should not be disturbed by a mere implication flowing from subsequent legislation."). Here, there is no clear statement of congressional intent to divest the federal courts of diversity jurisdiction over private TCPA claims. n6 As the Supreme Court has stated, "'in the absence of some affirmative showing of an intent to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable.'" *Colo. River Water*, 424 U.S. at 808 (quoting *Morton v. Mancari*, 417 U.S. 535, 550, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974)). As is clear from the statutory framework of the TCPA and the 1934 Act, discussed above, there is no such irreconcilability between § 1332 and § 227(b)(3); we thus conclude that [HN10] § 1332 applies to private actions under the TCPA. n7

n6 By contrast, Congress has enacted at least two statutes in other contexts that expressly limit the federal courts' diversity jurisdiction. The Johnson Act, 28 U.S.C. § 1342, states:

> The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision, where:
>
> (1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and,
>
> (2) The order does not interfere with interstate commerce; and,
>
> (3) The order has been made after reasonable notice and hearing; and,
>
> (4) A plain, speedy and efficient remedy may be had in the courts of such State.

The Tax Injunction Act, 28 U.S.C. § 1341, provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

[*18]

n7 The Seventh Circuit in *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446 (7th Cir. 2005), considered whether an action brought under the Class Action Fairness Act (CAFA), Pub. L. 109-2, 119 Stat. 4 (2005), alleging violations of the TCPA, could be removed to federal court. CAFA amended the diversity statute to vest original jurisdiction in the federal courts over class actions in which there is minimal diversity and the amount in controversy exceeds $ 5,000,000. 28 U.S.C. § 1332(d)(2). The Seventh Circuit ruled in *Brill* that federal courts have jurisdiction over private TCPA claims under both § 1331 and § 1332. 427 F.3d at 451. In *dicta*, the court stated without any explanation that if § 227(b)(3) did operate to vest "exclusive" jurisdiction in the state courts, "then it knocks out § 1332 as well as § 1331." *Id.* at 450. No other court of appeals has considered whether federal courts have diversity jurisdiction over private rights of action under the TCPA.

3. *Legislative History*

Having resolved [*19] the textual ambiguity by employing canons of statutory construction, we would not ordinarily consult the TCPA's legislative history. We find it advisable to do so in this case, however, because *Foxhall*, the district court, and the parties have relied on that history. Nothing in the legislative history undermines our conclusion that Congress did not intend to divest the federal courts of diversity jurisdiction over private TCPA claims.

The Senate Report on the bill noted that state legislation prohibiting unsolicited telemarketing had "had limited effect . . . because States do not have jurisdiction over interstate calls. Many States have expressed a desire for Federal legislation to regulate interstate telemarketing calls to supplement their restrictions on intrastate calls." S. Rep. No. 102-178, at 3 (1991), *as reprinted in* 1991 U.S.C.C.A.N. 1968, 1970. The report went on to state that "federal action is necessary because States do not have the jurisdiction to protect their citizens against those who use these machines to place interstate calls." *Id.* at 5, 1991 U.S.C.C.A.N. at 1973. Similarly, the Report of the House of Representatives indicated that "many states have [*20] passed laws that seek to regulate telemarketing through various time, place and manner restrictions . . . . However, telemarketers can easily avoid the restrictions of State law, simply by locating their phone centers out of state." H.R. Rep. No. 102-317, at 9-1 (1991). The bill's Senate sponsor made the following statement in support of the bill:

> The provision would allow consumers to bring an action in State court against any entity that violates the bill. The bill does not, because of constitutional constraints, dictate to the States which court in each State shall be the proper venue for such an action, as this is a matter for State legislators to determine. Nevertheless, it is my hope that States will make it as easy as possible for consumers to bring such actions, preferably in small claims court. . . . Small claims court or a similar court would allow the consumer to appear before the court without an attorney. . . . It would defeat the purposes of the bill if the attorneys' costs to consumers of bringing an action were greater than the potential damage.

137 Cong. Rec. S16204-01, S16205 (daily ed. Nov. 7, 1991) (statement of Sen. Hollings).

The legislative [*21] history indicates that Congress intended the TCPA to provide "interstitial law preventing evasion of state law by calling across state lines." *See Van Bergen v. Minnesota*, 59 F.3d 1541, 1548 (8th Cir. 1995). Congress thus sought to put the TCPA on the same footing as state law, essentially supplementing state law where there were perceived jurisdictional gaps. We see no reason to conclude that, by engaging in such interstitial law-making, Congress sought to restrict TCPA plaintiffs' access to the federal courts where an independent basis of federal jurisdiction exists. Insofar as Congress sought, via the TCPA, to enact the functional equivalent of a state law that was beyond the jurisdiction of a state to enact, it would be odd to conclude that Congress intended that statute to be treated differently, for purposes of diversity jurisdiction, from any other state statute. The reasoning of those district courts that have noted the anomaly that would result if a plaintiff alleging a state-law cause of action for unauthorized telemarketing could sue in federal court on the basis of diversity jurisdiction but a TCPA plaintiff could not do so is thus persuasive. n8 *See,* [*22] *e.g.*, *Kinder v. Citibank*, 2000 U.S. Dist. LEXIS 13853, No. 99 Civ. 2500, 2000 WL 1409762, at *4 (S.D. Cal. Sept. 14, 2000). Moreover, Carnival's interpretation of the statute would preclude the federal courts from exercising supplemental jurisdiction, pursuant to 28 U.S.C. § 1367, over TCPA claims. Thus, where a federal court exercised federal question jurisdiction over a claim involving other provisions of the Communications Act or diversity

jurisdiction over a claim under a parallel state statute, it could not hear a related TCPA claim. n9 In the absence of a clear expression of congressional intent that federal courts under no circumstances are to hear private TCPA claims, we have neither the authority nor the inclination to countenance such a result.

n8 It is odd, of course, that a federal court sitting in diversity and considering a TCPA claim would apply federal substantive and procedural law. This fact, however, only emphasizes the *sui generis* nature of the statute. It is the rare federal statute that creates a cause of action that gives rise to jurisdiction under § 1332, but not under § 1331.

[*23]

n9 A parallel state law claim might give rise to diversity jurisdiction where the communication was intrastate but the defendant is nonetheless a citizen of, and has its principal place of business in, another state. Moreover, although federal legislators apparently believed that states do not have jurisdiction over interstate calls, it is also *possible* that federal courts would have diversity jurisdiction over state-law claims involving interstate calls and parties of diverse citizenship. This Court is aware of no reasoned legal analysis supporting the belief expressed in the congressional reports that state laws could not reach such unsolicited, interstate advertisements.

Finally, although the district court is doubtless correct that Congress intended the TCPA to apply where there is diversity of citizenship between the parties, given the perception that state legislation could not reach interstate calls, *Gottlieb*, 367 F. Supp. 2d at 307, it is likely that Congress did not conceive that a private TCPA claim could meet the amount-in-controversy requirement for diversity [*24] jurisdiction. n10 Senator Hollings' statement that small claims courts would be the most appropriate fora for TCPA claims indicates that Congress sought to create a forum for cases involving diverse parties and small claims, but did not want to open the federal courts to claims for as little as $ 500. Although Congress apparently did not conceive that TCPA claims could satisfy the amount-in-controversy requirement, Congress's failure to foresee a circumstance in which diversity jurisdiction could be invoked does not serve as a barrier to federal jurisdiction in the absence of a clear statement of congressional intent to divest the federal courts of diversity jurisdiction. Moreover, if Congress divested the federal courts of federal question jurisdiction because it did not want federal courts to hear cases involving small claims, that concern is not implicated when the amount-in-controversy requirement for diversity jurisdiction is met. *See Accounting Outsourcing, LLC v. Verizon Wireless Personal Comm., LP*, 294 F. Supp. 2d 834, 837 (M.D. La. 2003) (noting that, in light of the TCPA's legislative history and small statutory damages, Congress viewed state courts as the [*25] appropriate forum for private causes of action under the TCPA because claims would be small in value); *Biggerstaff v. Voice Power Telecomm., Inc.*, 221 F. Supp. 2d 652, 657 (D.S.C. 2002) (noting that "Congress likely did not contemplate a potential conflict between § 227(b)(3) and § 1332 because the statutory damages were set at $ 500, well below the $ 75,000 amount in controversy," and opining that "it is not evident that Congress wanted the claims to be brought in state court even if they exceeded $ 75,000 and involved diverse parties").

n10 In order to meet the amount-in-controversy requirement, a single plaintiff would have to receive either 150 faxes from a single defendant, assuming $ 500 in statutory damages per fax, or 50 faxes from that defendant, assuming treble damages.

Having considered the statute's text, structure, history, and purpose, we conclude that Congress did not intend to divest the federal courts of diversity jurisdiction over private causes of action under the TCPA. [*26] We thus vacate the judgment of the district court and remand the case. We also vacate the judgment of the district court dismissing Gottlieb's claim under New York General Business Law § 396-aa for lack of supplemental jurisdiction in light of our holding that the district court has diversity jurisdiction over his TCPA claims. We take no position on the district court's alternative ruling on Gottlieb's state law claim other than to note that New York's statute does not, on its face, limit itself in the way the district court, relying on the purpose of the TCPA as expressed in the statute's legislative history, suggested. *See Gottlieb*, 367 F. Supp. 2d at 311 (noting that "§ 396-aa does not expressly limit its application to claims based on intrastate facsimiles" but concluding that the statute applies only to such communications "in view of Congress's intent that the TCPA extend the reach of state laws by regulating interstate communications").

CONCLUSION

For the foregoing reasons, we VACATE the judgment of the district court and REMAND the case for further proceedings consistent [*27] with this opinion.

SHERMAN GOTTLIEB, Plaintiff, -against- CARNIVAL CORPORATION, Defendant.

04-CV-4202 (ILG)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

367 F. Supp. 2d 301; 2005 U.S. Dist. LEXIS 7474

April 28, 2005, Decided
April 28, 2005, Filed

SUBSEQUENT HISTORY: Vacated by, Remanded by Gottlieb v. Carnival Corp., 2006 U.S. App. LEXIS 2677 (2d Cir. N.Y., Feb. 3, 2006)

DISPOSITION: [**1] Defendant's motion to dismiss with respect to plaintiff's TCPA claims (counts One, Two and Three) granted and defendant's motion to dismiss with respect to plaintiff's cause of action under N.Y. Gen. Bus. Law § 396-aa (Count Four) granted. Plaintiff's claims dismissed without prejudice to their renewal in state court.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff consumer alleged that defendant corporation sent him unsolicited facsimiles advertising its business. The consumer asserted causes of action under the Telephone Consumer Protection Act (TCPA), 47 U.S.C.S. § 227 et seq., and N.Y. Gen. Bus. Law § 396-aa. The corporation filed a motion to dismiss the state law and TCPA claims.

OVERVIEW: The text of the TCPA which provided that "a person or entity may, if otherwise permitted by the laws or rules of court of a state, bring in an appropriate court of that state an action", and the TCPA's legislative history indicated that Congress intended state courts to exercise exclusive jurisdiction over private causes of action under the TCPA. Therefore, because state courts had exclusive jurisdiction over claims that alleged violations of the TCPA, the district court lacked federal question subject matter jurisdiction under 28 U.S.C.S. § 1331 over the consumer's TCPA claims. Jurisdiction over TCPA claims resided in the state courts exclusively where the explicit reference to state courts, and the absence of any reference to federal courts reflected Congress' intent to withhold jurisdiction over such consumer suits in federal courts. Moreover, to conclude that when courts of appeal used the word "exclusively" in the context of the TCPA to mean it did not apply to diversity jurisdiction under 28 U.S.C.S. § 1332 was to conclude that "exclusively" meant "exclusively" except when it did not. Thus, the court lacked diversity jurisdiction under 28 U.S.C.S. § 1332 over the TCPA claims.

OUTCOME: The corporation's motion to dismiss was granted with respect to the consumer's TCPA claims and the consumer's cause of action under N.Y. Gen. Bus. Law § 396-aa The court dismissed the consumer's claims without prejudice to their renewal in state court.

LexisNexis(R) Headnotes

Civil Procedure > Pleading & Practice > Defenses, Objections & Demurrers > Failure to State a Cause of Action
Civil Procedure > Pleading & Practice > Defenses, Objections & Demurrers > Motions to Dismiss
[HN1] When deciding a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), a court takes the facts as alleged in the complaint to be true, and must draw all reasonable inferences from those facts in favor of the plaintiff. Motions to dis-

miss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) are reviewed under the same standards as motions to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6). A court must not dismiss a complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Antitrust & Trade Law > Consumer Protection > Telemarketing
Communications Law > Federal Acts > Telephone Consumer Protection Act
[HN2] The Telephone Consumer Protection Act, 47 U.S.C.S. § 227 et seq., makes it unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine. 47 U.S.C.S. § 227(b)(1)(C).

Antitrust & Trade Law > Consumer Protection > Telemarketing
Communications Law > Federal Acts > Telephone Consumer Protection Act
[HN3] See 47 U.S.C.S. § 227(b)(3).

Communications Law > Federal Acts > Telephone Consumer Protection Act
[HN4] If a court finds that the defendant "willfully or knowingly" violated the Telephone Consumer Protection Act, 47 U.S.C.S. § 227 et seq., it may award treble damages in the amount of $ 1,500 per facsimile.

Antitrust & Trade Law > Consumer Protection > Telemarketing
Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Action
Communications Law > Federal Acts > Telephone Consumer Protection Act
[HN5] The United States Court of Appeals for the Second Circuit has affirmed a district court's holding that it lacked jurisdiction over a plaintiff's claim because the Telephone Consumer Protection Act (TCPA), 47 U.S.C.S. § 227 et seq., confers exclusive jurisdiction on state courts over private causes of action brought under 47 U.S.C.S. § 227(b)(3). The court affirmed, reaching the somewhat unusual conclusion that state courts have exclusive jurisdiction over a cause of action created by a federal statute. The court gleaned Congress's intent with respect to jurisdiction over private TCPA actions from the text of the Act, specifically: A person or entity may, if otherwise permitted by the laws or rules of court of a state, bring in an appropriate court of that state an action. 47 U.S.C.S. § 227(b)(3) The court found that language significant in light of the TCPA's silence as to federal court jurisdiction over private actions.

Antitrust & Trade Law > Consumer Protection > Telemarketing
Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Action
Communications Law > Federal Acts > Telephone Consumer Protection Act
[HN6] In holding that the statutory grant of permissive authorization of jurisdiction to state courts conferred exclusive jurisdiction over claims under the Telephone Consumer Protection Act (TCPA), 47 U.S.C.S. § 227 et seq., on those courts, the United States Court of Appeals for the Second Circuit has distinguished between state courts of general jurisdiction and federal courts of limited jurisdiction. When the permissive authorization extends only to courts of general jurisdiction, that authorization cannot confer jurisdiction on unmentioned courts of limited jurisdiction, which require a specific grant. If a federal statute permissively authorizes suit in federal court, that authorization does not of necessity preclude suit in state courts of general jurisdiction, which are presumed competent unless otherwise stated. But the contrary assertion cannot be true. If a statute authorizes suit in state courts of general jurisdiction through the use of the term "may," that authorization cannot confer jurisdiction on a federal court because federal courts are competent to hear only those cases specifically authorized. In light of that difference between the federal and state courts, it is meaningful that Congress explicitly mentioned only state courts in 47 U.S.C.S. § 227(b)(3) because usually mentioning state courts is unnecessary to vest them with concurrent jurisdiction.

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Federal Question Jurisdiction

[HN7] 28 U.S.C.S. § 1331 provides that the district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States. The federal question jurisdiction of the inferior federal courts depends on Congress's intent as manifested by the federal statute creating the cause of action at issue, notwithstanding the breadth 28 U.S.C.S. § 1331. With respect to the Telephone Consumer Protection Act, 47 U.S.C.S. § 227 et seq., Congress's intent not to create federal question jurisdiction over private causes of action is manifested in 47 U.S.C.S. § 227(b)(3), where it specifically empowered state courts to entertain such actions.

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Action
Communications Law > Federal Acts > Telephone Consumer Protection Act
[HN8] The Telephone Consumer Protection Act (TCPA), 47 U.S.C.S. § 227 et seq., permits state attorneys general to bring civil actions on behalf of state residents for unsolicited calls or faxes for either injunctive or monetary relief. 47 U.S.C.S. § 227(f)(1). Congress provided that federal district courts shall have exclusive jurisdiction over those actions. 47 U.S.C.S. § 227(f)(2). Similarly, in other provisions of the Communications Act of 1934, which the TCPA amends, Congress has expressly provided for concurrent jurisdiction of federal courts and state courts of general jurisdiction.

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Federal Question Jurisdiction
Communications Law > Federal Acts > Telephone Consumer Protection Act
[HN9] Because state courts have exclusive jurisdiction over claims alleging violations of the Telephone Consumer Protection Act (TCPA), 47 U.S.C.S. § 227 et seq., federal district courts lack federal question subject matter jurisdiction over a plaintiff's TCPA claims.

Civil Procedure > Jurisdiction > Diversity Jurisdiction > Amount in Controversy
Civil Procedure > Jurisdiction > Diversity Jurisdiction > Citizenship
[HN10] A plaintiff asserting diversity jurisdiction must show: (1) complete diversity of citizenship between the parties; and (2) an amount in controversy exceeding $ 75,000.

Civil Procedure > Jurisdiction > Diversity Jurisdiction
[HN11] 28 U.S.C.S. § 1332(a) vests federal district courts with diversity jurisdiction in all civil actions.

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Action
Communications Law > Federal Acts > Telephone Consumer Protection Act
Governments > Legislation > Interpretation
[HN12] The United States District Court for the Eastern District of New York is persuaded that the Telephone Consumer Protection Act (TCPA), 47 U.S.C.S. § 227 et seq., and its legislative history lead to the conclusion that jurisdiction over TCPA claims resides in the state courts exclusively. Courts of appeal having addressed the issue have consistently held that the TCPA does not grant federal court jurisdiction over private causes of action brought pursuant to the TCPA. Looking to the statute as a whole, and attempting to give effect to every provision, the explicit reference to state courts, and the absence of any reference to federal courts reflects Congress's intent to withhold jurisdiction over such consumer suits in federal courts.

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Action
Communications Law > Federal Acts > Telephone Consumer Protection Act
Governments > Legislation > Interpretation
[HN13] The federal law that creates a cause of action may also manifest a particular intent to assign the cause of action to courts other than district court, and accordingly, the Telephone Consumer Protection Act, 47 U.S.C.S. § 227 et seq., provides for exclusive state court jurisdiction of private actions for unsolicited advertisements via facsimile machines.

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Action

Communications Law > Federal Acts > Telephone Consumer Protection Act
Governments > Legislation > Interpretation

[HN14] The United States Court of Appeals for the Second Circuit has held that like the United States Court of Appeals for the Fourth Circuit, and the other circuit courts that considered the issue before it, the court too reach the somewhat unusual conclusion that state courts have exclusive jurisdiction over a cause of action created by a federal state, the Telephone Consumer Protection Act (TCPA), 47 U.S.C.S. § 227 et seq. Elaborating on that conclusion, the court wrote: Thus, while it is generally true that an action that arises under a federal statute will properly be brought in federal district court, that is not always the case. Inferior federal courts' federal question jurisdiction ultimately depends upon Congress's intent as manifested by the federal statute creating the cause of action. The text of the TCPA indicates that Congress intended to assign private rights of action exclusively to courts other than the federal district courts. The court also found it significant that where Congress wanted to provide for exclusive federal jurisdiction over suits brought by a state's attorney general on behalf of states' residents for violations of the TCPA it said so.

Antitrust & Trade Law > Consumer Protection > Telemarketing

[HN15] See N.Y. Gen. Bus. Law § 396-aa.

Communications Law > Federal Acts > Telephone Consumer Protection Act
Constitutional Law > Congressional Duties & Powers > Commerce Clause
Constitutional Law > Supremacy Clause

[HN16] 47 U.S.C.S. § 227(e)(1) states that the Telephone Consumer Protection Act (TCPA), 47 U.S.C.S. § 227 et seq., does not preempt any state law that imposes more restrictive intrastate requirements or regulations on, or which prohibits: (A) the use of telephone facsimile machines or other electronic devises to send unsolicited advertisements. Moreover, the legislative history of the TCPA indicates that Congress acted pursuant to the Commerce Clause to prohibit interstate communications where the states could not because they lack jurisdiction. U.S. Const. art. I, § 8, cl. 3. Congress found that over half the states now have statutes restricting various uses of the telephone for marketing, but telemarketers can evade their prohibitions through interstate operation; therefore, federal law is needed to control residential telemarketing practices. Courts recognize that Congress enacted the TCPA to supplement similar state legislation to protect the privacy interests of residential phone subscribers against unwanted interstate phone and facsimile solicitations because states do not have jurisdiction over interstate calls.

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For Carnival Corporation, Defendant: Joseph J. Saltarelli, Hunton & Williams LLP, New York, NY.

JUDGES: I. Leo Glasser, United States District Judge.

OPINIONBY: I. Leo Glasser

OPINION:

[*302] MEMORANDUM AND ORDER

GLASSER, United States District Judge:

In this action Sherman Gottlieb ("plaintiff") alleges that Carnival Corporation ("defendant" or "Carnival") sent him unsolicited facsimiles advertising its business. Plaintiff asserts causes of action under the Telephone Consumer Protection Act ("TCPA" or the "Act"), 47 U.S.C. § 227(b)(1), and New York General Business Law ("N.Y. Gen. Bus. Law") § 396-aa. Pending before the Court is defendant's motion to dismiss.

FACTS

The [**2] Court takes the following facts from plaintiff's amended complaint and accepts them as true as it must on a motion to dismiss. Plaintiff is a travel agent who works from his home where he has a fax machine associated with two telephone numbers. Amended Complaint ("Am. Compl.") P9. He brings this action against Carnival, a cruise company that solicits individuals throughout the United States and globally to book trips on its ships. Id. PP8, 9. Plaintiff alleges that from early 2001 to 2004 he received over 1,000 fax advertisements from defendant. Id. PP10, 13. On "numerous occasions," plaintiff sent faxes to defendant requesting that it cease sending the unsolicited fax advertisements. Id. P11. Additionally, he contacted the "1-800" number listed on the unsolicited faxes to request that defendant stop sending him faxes. Id. Defendant continued to send facsimile advertisements to plaintiff, notwithstanding plaintiff's requests. Id. P12.

Plaintiff commenced this action alleging that by faxing unsolicited advertisements to plaintiff, defendant violated the TCPA and N.Y. Gen. Bus. Law § 396-aa. In Count One of the amended complaint, plaintiff [**3] seeks statutory damages of $ 500 per fax. Id. P27. In Count Two, plaintiff alleges that defendant "willfully or knowingly" sent the unsolicited faxes and that therefore the TCPA entitles him to treble damages in the amount of $ 1,500 per fax. Id. P34. In Count Three, plaintiff seeks injunctive relief against defendant on the basis of defendant's wilful violation of the TCPA. Id. P36. Finally, in Count Four, plaintiff alleges that defendant violated N.Y. Gen. Bus. Law § 396-aa by sending "numerous" facsimile advertisements that exceeded five pages in length which plaintiff received between 9:00 p.m. and 6:00 a.m. Id. P40. Additionally, plaintiff alleges that he received "numerous" faxes from defendant between 6:00 a.m. and 9:00 p.m in violation of § 396-aa. Id. P41. Plaintiff further alleges that defendant continued to send the faxes, notwithstanding the written notice plaintiff sent to defendant indicating that he did not wish to receive any faxes. Id. P42. Plaintiff seeks $ 100 in statutory damages pursuant to § 396-aa for each fax unlawfully sent by defendant. Id. P44.

Defendant moves this Court for an order dismissing [**4] plaintiff's complaint pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction and Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted.

DISCUSSION

[HN1] When deciding a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), a court takes the facts as alleged in the complaint to be true, and must draw all reasonable inferences from those facts in [*303] favor of the plaintiff. See Ortiz v. Cornetta, 867 F.2d 146, 149 (2d Cir. 1989). "Motions to dismiss for [lack of] subject matter jurisdiction under Rule 12(b)(1) are reviewed under the same standards as motions to dismiss for failure to state a claim under Rule 12(b)(6)." Walker v. New York, 345 F. Supp. 2d 283, 286 (E.D.N.Y. 2004) (Hurley, J.) (citations omitted). A court must not dismiss a complaint "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957).

I. TCPA Claims [**5]

The TCPA [HN2] makes it unlawful "for any person within the United States, or any person outside the United States if the recipient is within the United States ... to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine...." 47 U.S.C. § 227(b)(1)(C). The TCPA creates a private right of action:

> [HN3] A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State (A) an action based on a violation of this subsection ... to enjoin such violation, (B) an action to recover for actual monetary loss from such a violation, or to receive $ 500 in damages for each such violation, whichever is greater, or (C) both such actions.

Id. § 227(b)(3). Moreover, [HN4] if a court finds that the defendant "willfully or knowingly" violated the TCPA, it may award treble damages in the amount of $ 1,500 per facsimile. Id.

A. Federal Question Jurisdiction

Defendant's principal contention with regard to subject matter jurisdiction is that plaintiff's complaint does not raise a federal question on which jurisdiction can be [**6] grounded pursuant to 28 U.S.C. § 1331. Defendant asserts this argument, notwithstanding that plaintiff alleges diversity jurisdiction pursuant to 28 U.S.C. § 1332, rather than federal question subject matter jurisdiction. See Am. Compl. P4. n1 Because the question whether federal courts have federal question jurisdiction over TCPA claims has vexed other courts and defendant devotes considerable effort to making this argument, the Court will first address federal question subject matter jurisdiction. In Foxhall Realty Law Offices, Inc. v. Telecomm. Premium Servs., Ltd., 156 F.3d 432 (2d Cir. 1998), plaintiff Foxhall brought a putative class action suit alleging that defendant faxed him an unsolicited advertisement in violation of the TCPA. Id. at 434. Defendant moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction and Fed. R. Civ. P. 12(b)(2) for lack of personal jurisdiction. 975 F. Supp. 329, 330 (S.D.N.Y. 1997). [HN5] The district court held that it lacked [**7] jurisdiction over plaintiff's claim because the TCPA confers exclusive jurisdiction on state courts over private causes of action brought under § 227(b)(3). Id. at 331. The Second Circuit affirmed, reaching "'the somewhat unusual conclusion that state courts have exclusive jurisdiction over a cause of action created by' a federal statute...." 156 F.3d at 434 (quoting International Science & Tech. Inst. v. Inacom Communs., 106 F.3d 1146, 1150 (4th Cir. 1997) (hereinafter "Int'l Science")). n2

n1 Plaintiff does not dispute that this Court lacks federal question subject matter jurisdiction over his TCPA claims. See Pl. Opp. at 2-8. Indeed, plaintiff appears to concede that state courts have exclusive jurisdiction over TCPA claims. See id. at 4, 5 n.3.

n2 The other courts of appeal that have considered the issue -- the Third, Fourth, Fifth, Ninth and Eleventh circuits -- have reached the same conclusion. See Murphey v. Lanier, 204 F.3d 911 (9th Cir. 2000); ErieNet, Inc. v. Velocity Net, Inc., 156 F.3d 513 (3d Cir. 1998); Nicholson v. Hooters of Augusta, Inc., 136 F.3d 1287 (11th Cir. 1998); Chair King, Inc. v. Houston Cellular Corp., 131 F.3d 507 (5th Cir. 1997). Additionally, the Sixth Circuit recognized the "overwhelming authority" holding that state courts have exclusive jurisdiction over TCPA claims. See Dun-Rite Constr., Inc. v. Amazing Tickets, Inc., 2004 U.S. App. LEXIS 28047, 2004 WL 3239533, at *2 (6th Cir. Dec. 16, 2004) (affirming remand to state court of complaint alleging violations of the TCPA and analogous Ohio state law because there was no basis for removal to federal court which lacked subject matter jurisdiction). Federal district courts also hold that state courts have exclusive jurisdiction over TCPA claims. See Biggerstaff v. Voice Power Telecomm., Inc., 221 F. Supp. 2d 652, 654-56 (D.S.C. 2002); Compoli v. AVT Corp., 116 F. Supp. 2d 926, 928 (N.D. Ohio 2000). But see Kenro, Inc. v. Fax Daily, Inc., 904 F. Supp. 912, 913-15 (S.D. Ind. 1995) (holding that federal question jurisdiction under 28 U.S.C. § 1331 existed over TCPA claims and that state and federal courts have concurrent jurisdiction over those claims), motion for reconsideration denied by 962 F. Supp. 1162 (S.D. Ind. 1997). In addition, New York courts have held that jurisdiction over TCPA claims rests exclusively with state courts. See Schulman v. Chase Manhattan Bank, 268 A.D.2d 174, 178, 710 N.Y.S.2d 368 (2d Dep't 2000); Ganci v. Cape Canaveral Tour & Travel, Inc., 4 Misc. 3d 1003A, 791 N.Y.S.2d 869, 2004 WL 1469372, at *1 (N.Y. Sup. Ct. 2004).

[**8]

[*304] The Court gleaned Congress's intent with respect to jurisdiction over private TCPA actions from the text of the Act, specifically: "A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State an action...." § 227(b)(3) (emphasis added). n3 It found that language significant in light of the Act's silence as to federal court jurisdiction over private actions. n4 [HN6] In holding that the statutory grant of permissive authorization of jurisdiction to state courts conferred exclusive jurisdiction over TCPA claims on those courts, the Second Circuit distinguished between state courts of general jurisdiction and federal courts of limited jurisdiction.

> When ... the permissive authorization extends only to courts of general jurisdiction, that authorization cannot confer jurisdiction on unmentioned courts of limited jurisdiction, which require a specific grant. If a federal statute permissively authorizes suit in federal court, that authorization does not of necessity preclude suit in state courts of general jurisdiction, which are presumed competent unless otherwise stated. But the contrary assertion cannot [**9] be true. If a statute authorizes suit in state courts of general jurisdiction through the use of the term 'may,' that authorization cannot confer jurisdiction on a federal court because federal courts are competent to hear only those cases specifically authorized... [*305] In light of this difference between the federal and state courts, it is meaningful that Congress explicitly mentioned only state courts in 47 U.S.C. § 227(b)(3) because under usual circumstances, mentioning state courts is unnecessary to vest them with concurrent jurisdiction.

156 F.3d at 435 (quoting Int'l Science, 106 F.3d at 1151-52). The Court noted that its conclusion was not altered by the general federal question jurisdiction statute, 28 U.S.C. § 1331, which [HN7] provides that "the district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." That is because the federal question jurisdiction of the inferior federal courts "depends on Congress's intent as manifested by the federal statute creating the cause of action" at issue, notwithstanding the breadth [**10] § 1331. 156 F.3d at 436 (citation and quotation marks omitted). With respect to the TCPA, the Court concluded that Congress's intent not to create federal question jurisdiction over private causes of action is manifested in § 227(b)(3), where it specifically empowered state courts to entertain such actions. Id.

n3 According to this provision, states may refuse to exercise jurisdiction over TCPA claims. See Foxhall, 156 F.3d at 438. See also Int'l Science, 106 F.3d at 1157 ("we believe Congress

acted rationally in both closing federal courts and allowing states to close theirs to the millions of private actions that could be filed"). Courts interpret this provision as indicating Congress's effort to avoid any conflict with the Tenth Amendment which might be created had it coerced state courts to hear TCPA claims. See id. at 1158; see also Murphey, 204 F.3d at 914 (statutory language allowing state courts not to enforce federal right under TCPA avoids violation of the Tenth Amendment).

n4 "The TCPA presents an unusual constellation of statutory features, viz., the express creation of a private right of action, an express jurisdictional grant to state courts to entertain them, and silence as to federal court jurisdiction of private actions." Chair King, 131 F.3d at 512; see also Murphey, 204 F.3d at 914 ("the express reference to state court jurisdiction does not mean that federal jurisdiction also exists; instead, the failure to provide for federal jurisdiction indicates that there is none").

[**11]

The Court found further support for its conclusion that Congress intended litigants to bring suits under § 227(b)(3) in state court in another section of the TCPA. Id. The Act [HN8] permits state attorneys general to bring civil actions on behalf of state residents for unsolicited calls or faxes for either injunctive or monetary relief. § 227(f)(1). Congress provided that federal district courts shall have exclusive jurisdiction over those actions. § 227(f)(2). Similarly, in other provisions of the Communications Act of 1934, which the TCPA amends, Congress expressly provided for concurrent jurisdiction of federal courts and state courts of general jurisdiction. See Foxhall, 975 F. Supp. 2d at 331 (listing examples).

Finally, the Second Circuit held that the purpose and legislative history of the TCPA indicates that Congress intended state courts to exercise exclusive jurisdiction over private causes of action under the Act. Specifically, the purpose of the Act was to "'protect the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated telephone calls to the home and to facilitate interstate commerce by restricting [**12] certain uses of facsimile machines' ... Although over forty state legislatures had enacted measures restricting unsolicited telemarketing, these measures had limited effect because states do not have jurisdiction over interstate calls." 156 F.3d at 437 (citation omitted). Additionally, the Act's legislative history reveals that Senator Hollings, who authored the bill, made the significant statement that the private right of action would make it easier for consumers to recover damages for unsolicited advertisements in state court, specifically in small claims court where consumers could appear without an attorney. Id. See also Chair King, 131 F.3d at 513. Foxhall compels the conclusion that [HN9] because state courts have exclusive jurisdiction over claims alleging violations of the Act, this Court lacks federal question subject matter jurisdiction over plaintiff's TCPA claims.

B. Diversity Jurisdiction

In the absence of federal question jurisdiction, the Court considers plaintiff's allegations that diversity jurisdiction exists over his TCPA claims pursuant to 28 U.S.C. § § 1332 (a) and (c). See Am. Compl. P4; see Pl. [**13] Opp. at 3. [HN10] A plaintiff asserting diversity jurisdiction must show (1) complete diversity of citizenship between the parties; and (2) an amount in controversy exceeding $ 75,000. See Caterpillar, Inc. v. Lewis, 519 U.S. 61, 68, 136 L. Ed. 2d 437, 117 S. Ct. 467 (1996). The [*306] parties in this case do not dispute that plaintiff adequately alleges diverse citizenship of the parties and the requisite amount in controversy with respect to his TCPA claims. The complaint alleges that plaintiff is a citizen of New York, where he resides, and that defendant is incorporated under the laws of Panama, with its principal place of business in Florida. Am. Compl. PP7, 8. Additionally, plaintiff alleges that he suffered at least $ 500,000 in damages under the TCPA as a result of the more than 1,000 unsolicited faxes which defendant sent to him. Id. P27.

The parties do, however, dispute that federal courts have diversity jurisdiction over TCPA claims. Defendant argues that they do not because the "private right of action under the TCPA is [not] akin to a state law cause of action" to which § 1332 is applicable. See Def. Mem. at 7. As an initial matter, the Court notes that reliance on the text of § 1332(a) [**14] alone is insufficient as [HN11] that section vests federal district courts with diversity jurisdiction in "all civil actions." Thus, it turns to defendant's argument that case law construing the TCPA and its legislative history compel the conclusion that federal diversity jurisdiction was similarly excluded over actions based on that Act. Although none of the courts of appeal that have ruled on federal courts' subject matter jurisdiction over TCPA claims addressed the availability of diversity jurisdiction, several district courts have held that diversity jurisdiction may lie over TCPA claims. See Pl. Opp. at 3-5. For example, in Kopff v. World Research Group, LLC, 298 F. Supp. 2d 50, 52 (D.D.C. 2003), plaintiff brought suit in state court alleging violations of the TCPA and the District of Columbia Consumer Protection and Procedures Act and a negligence claim, and seeking $ 78,000 in damages. Defendants then removed the action to federal court asserting diversity jurisdiction under 28 U.S.C. § 1332. Id. at 53. Plaintiff moved to remand the case to state court, n5 arguing that

there was no federal question jurisdiction over the [**15] TCPA claims and that therefore there was no basis for a federal court to exercise diversity jurisdiction over those claims. Id. The court held that diversity jurisdiction is not a "general jurisdictional grant" that is circumscribed by Congress's specific jurisdictional provision in § 227(b)(3); rather, diversity jurisdiction is an independent basis for the exercise of jurisdiction by federal courts over TCPA claims. Id. at 55. Therefore, the court held that diversity jurisdiction was proper because the parties were diverse and plaintiffs alleged damages sufficient to satisfy the amount-in-controversy requirement under § 1332(a). Id. at 56. Other district courts have similarly concluded that diversity jurisdiction exists over TCPA claims. See, e.g., Jeffrey Press, Inc. v. Hartford Cas. Ins. Co., 326 F. Supp. 2d 626, 630 (E.D. Pa. 2004); Gold Seal Termite & Pest Control Co. v. DirecTV, Inc., 2003 U.S. Dist. LEXIS 11205, 2003 WL 21508177, at **4-5 (S.D. Ind. June 10, 2003); Accounting Outsourcing v. Verizon Wireless Personal Communications, 294 F. Supp. 2d 834, 839-40 (M.D. La. 2003); Biggerstaff, 221 F. Supp. 2d at 657; [**16] Kinder v. Citibank, 2000 U.S. Dist. LEXIS 13853, 2000 WL 1409762, at **2-3 (S.D. Cal. Sept. 14, 2000). Significantly, Accounting and Kinder held that diversity jurisdiction exists after the courts of appeal in the circuits in which they are located held that there is no federal question jurisdiction over TCPA claims. See Accounting, 294 F. Supp. 2d at 837 (the fact that state common law claims based on the same facts as [*307] TCPA claims or claims based on the state law analogue to the TCPA could be maintained in federal court where § 1332 is satisfied suggests courts have diversity jurisdiction over TCPA claims); Kinder, 2000 U.S. Dist. LEXIS 13853, 2000 WL 1409762, at *3 (exclusive state court jurisdiction even in cases where diversity of citizenship exists "would create the anomalous result that state law claims based on unlawful telephone calls could be brought in federal court, while federal TCPA claims based on those same calls could be heard only in state court"). n6

n5 While the procedural posture of Kopff is distinguishable -- there, defendants sought to have the action adjudicated in federal court, while here, defendant seeks dismissal of this case from federal court -- the court's discussion of diversity of citizenship as a basis for federal court jurisdiction over TCPA claims is instructive.
[**17]

n6 Defendant cites Dones v. Eastern Air Lines, Inc., 408 F. Supp. 1044, 1046 (D.P.R. 1975), and Caribou Four Corners, Inc. v. American Oil Co., 628 F. Supp. 363, 377 (D. Utah 1985), in support of its position that this Court lacks diversity jurisdiction over plaintiff's TCPA claims because it lacks subject matter jurisdiction over them. Def. Reply Mem. at 6, 7. Those cases are inapposite because they involved the exclusive jurisdiction of administrative agencies over claims under, respectively, the Emergency Petroleum Allocation Act and the National Labor Relations Act.

[HN12] This Court is persuaded, however, that the statute and its legislative history lead to the conclusion that jurisdiction over TCPA claims resides in the state courts exclusively. A concise statement of the reason for the enactment of 47 U.S.C. § 227(b)(1)(C) which bespeaks that conclusion is found in the Legislative History of Senate Report No. 102-178 to the effect that "Federal action is necessary because States do not have the jurisdiction to protect their citizens against [**18] those who use these machines to place interstate telephone calls." S. Rep. No. 102-178, at 5 (1991). In the "Background and Need for the Legislation" section of the House of Representatives Report, H.R. Rep. 102-317, the reason for the legislation is similarly expressed as follows. "Many States have passed laws that seek to regulate telemarketing through various time, place and manner restrictions... However, telemarketers can easily avoid the restrictions of State law, simply by locating their phone centers out of state." H.R. Rep. No. 102-317, at 9-10 (1991). The inference is reasonable if not irresistible that aiming as it was at the interstate transmission of unwanted fax transmissions, and at "telemarketers who locate their phone centers out of state," Congress was necessarily mindful of transmissions conceived in one state and landed, unwanted, in another and the diversity of jurisdiction that followed in its wake. Courts of appeal having addressed the issue have consistently held that the TCPA does not grant federal court jurisdiction over private causes of action brought pursuant to that Act. In ErieNet, 156 F.3d at 518, the Court went on to observe that [**19] the focus of the statements of Senator Hollings, the sponsor of the legislation, was entirely on state courts without any indication that he "contemplated private enforcement actions in federal courts," a statement that reflects and is entirely consistent with the language of the statute. "Thus, looking to the statute as a whole, and attempting to give effect to every provision, we find that the explicit reference to state courts, and the absence of any reference to federal courts reflects Congress' intent to withhold jurisdiction over such consumer suits in federal courts." Id.

Int'l Science, 106 F.3d at 1155, perhaps the most frequently cited case in this regard and the most expan-

sively reasoned, reached the same conclusion, namely, that [HN13] "the federal law that creates a cause of action may also manifest a particular intent to assign the cause of action to courts other than district courts...," and accordingly, the TCPA provided for exclusive state court jurisdiction of private actions for unsolicited advertisements via facsimile machines.

[*308] In support of its motion to dismiss, the defendant urges that the following excerpt from the opinion of the Court in [**20] Int'l Science counsels that its motion be granted:

> despite the usual reliability of the principle that a suit arises under the law that creates the cause of action, the Supreme Court has sometimes found that formally federal causes of action were not properly brought under federal-question jurisdiction... For example, in Shoshone Mining Co. v. Rutter, 177 U.S. 505, 20 S. Ct. 726, 44 L. Ed. 864 (1900), the Supreme Court held that there was no federal-question jurisdiction over suits authorized by federal statute to determine mining claims. The Court found that notwithstanding the federal statutory basis, Congress intended that because of the predominance of state issues the cases be litigated in state courts unless there was diversity of citizenship.

Id. at 1154 (emphasis added) (citations and internal quotation marks omitted).

A close reading of Shoshone, however, does not counsel the result urged by the defendant; rather, it counsels the opposite. The suit in that case was initiated in the federal court in Idaho. With regard to the statute in question there, when

> Congress authorized that which is familiarly known in the mining [**21] regions as an 'adverse suit,' it simply declared that the adverse claimant should commence proceedings in a court of competent jurisdiction. It did not in express language prescribe either a Federal or a state court, and did not provide for exclusive or concurrent jurisdiction. If it had intended that the jurisdiction should be vested only in the Federal courts, it would undoubtedly have said so. If it had intended that any new rule of demarcation between the jurisdiction of the Federal and state courts should apply, it would likewise undoubtedly have said so. Leaving the matter as it did, it unquestionably meant that the competency of the court should be determined by rules theretofore prescribed in respect to the jurisdiction of the Federal Courts.

177 U.S. at 506-07 (emphasis added) (internal quotation marks omitted). If diversity of citizenship existed and the amount in controversy exceeded the then statutory limit, then by virtue of the "rules theretofore prescribed," the federal court would have had jurisdiction. But because diversity of citizenship did not exist, the Court held that the federal court did not have jurisdiction and the case was directed [**22] to be remanded to the United States Circuit Court of the northern district of Idaho with instructions to remand the case to the state court. Id. at 514.

Here, however, Congress intended a rule of demarcation between the jurisdiction of the federal and state courts should apply and it did, undoubtedly, say so. In Foxhall, 156 F.3d at 434, [HN14] the Court held "Like the Fourth Circuit, and the other circuit courts that have considered the issue before us, we too reach the somewhat unusual conclusion that state courts have exclusive jurisdiction over a cause of action created by a federal state, the Telephone Consumer Protection Act of 1991...." (emphasis added) (internal quotation marks omitted). Elaborating on that conclusion, the Court wrote:

> Thus, while it is generally true that an action that arises under a federal statute will properly be brought in federal district court, that is not always the case. Inferior federal courts' 'federal question' jurisdiction ultimately depends upon Congress's intent as manifested by the federal statute creating the cause of action.... In our view, the text of the TCPA indicates that Congress intended [*309] to assign [**23] private rights of action exclusively to courts other than the federal district courts.

Id. at 436 (emphasis added) (internal citations omitted). The Court also found it significant that where Congress wanted to provide for exclusive federal jurisdiction over suits brought by a state's attorney general on behalf of

states' residents for violations of the TCPA it said so. See 47 U.S.C. § 227(f)(2) ("The district Courts of the United States ... shall have exclusive jurisdiction over all civil actions brought under this subsection.").

Concededly, neither ErieNet, Int'l Science nor Foxhall presented the issue of diversity, although diversity did, in fact, exist in Foxhall, the plaintiff's principal place of business being in New York and the defendant's North American headquarters being in Edison, New Jersey. See Brief for Appellant at 5, Foxhall Realty Law Offices v. Telecommunications Premium Servs. 156 F.3d 432, 1998 WL 34180201 (2d Cir. 1998) (No. 97-9147). It must be assumed, however, that Int'l Science (upon which ErieNet and Foxhall relied), in citing Shoshone was familiar with its teaching [**24] which was previously alluded to, namely, that had Congress intended that a new rule of demarcation between federal and state courts should apply it undoubtedly would have said so and it did in its enactment of the TCPA.

When, in Foxhall, the Court held that state courts have exclusive jurisdiction over a cause of action created by the TCPA, and in ErieNet, that Congress intended to withhold jurisdiction over suits in federal court, and in Int'l Science, that Congress intended to authorize private enforcement of the TCPA exclusively in state courts, it must be assumed that it used its words carefully and advisedly. Being conscious of the admonition against making a fortress out of the dictionary, the word "exclusively" requires no definition. To conclude that when courts of appeal used the word "exclusively" to mean it does not apply to diversity jurisdiction is to conclude that "exclusively" means "exclusively" except when it does not and would be reminiscent of the colloquy between Humpty Dumpty and Alice:

> "when I use a word," Humpty Dumpty said, ... "it means just what I choose it to mean-neither more nor less." "The question is," said Alice, "whether [**25] you can make words mean so many different things."

Lewis Carroll, Through the Looking Glass, Ch. VI.

For all those reasons, the motion to dismiss plaintiff's TCPA claims is granted.

II. New York General Business Law § 396-aa Claim

A. Subject Matter Jurisdiction

In addition to his TCPA claims, plaintiff asserts a claim under N.Y. Gen. Bus. Law § 396-aa (1996), New York's analogue to the federal statute. n7 See Am. Compl. Count IV. Defendant moves to dismiss plaintiff's state law claim arguing that he fails to allege the $ 75,000 amount in controversy required by 28 U.S.C. § 1332(a). In opposition, plaintiff concedes that he has not alleged the requisite amount in controversy with regard to his state law [*310] claim. PI. Opp. at 8. Accordingly, the Court dismisses plaintiff's claim under N.Y. Gen. Bus. Law § 396-aa for lack of subject matter jurisdiction. n8

> n7 That section provides: [HN15] "It shall be unlawful for a person, corporation, partnership or association to initiate the unsolicited transmission of telefacsimile messages promoting goods or services for purchase by the recipient of such messages... This section shall not apply to ... transmissions not exceeding five pages received between the hours of 9:00 P.M. and 6:00 A.M. local time... Any person who has received a telefacsimile transmission in violation of this section may bring an action in his own name to recover his actual damages or one hundred dollars, whichever is greater." § 396-aa.

[**26]

> n8 Plaintiff argues that this Court should exercise supplemental jurisdiction over his § 396-aa claim pursuant to 28 U.S.C. § 1367(a) because it forms part of the same case or controversy as his TCPA claims. See PI. Opp. at 8. In light of the Court's dismissal of plaintiff's TCPA claims for lack of subject matter jurisdiction, there are no federal claims to which plaintiff's state law claim relates that provide a basis for supplemental jurisdiction. See Nowak v. Ironworkers Local 6 Pension Fund, 81 F.3d 1182, 1187 (2d Cir. 1996) ("While the district court may, at its discretion, exercise supplemental jurisdiction over state law claims even where it has dismissed all claims over which it had original jurisdiction, see 28 U.S.C. § 1367(c)(3), it cannot exercise supplemental jurisdiction unless there is first a proper basis for original jurisdiction").

B. Failure to State a Cause of Action

In addition, plaintiff fails to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6) [**27] . In moving to dismiss the claim on this ground, defendant argues that § 396-aa prohibits only unsolicited intrastate facsimiles, rather than interstate facsimiles over which New York lacks jurisdiction. Fur-

ther, defendant contends that because plaintiff does not allege that he received facsimiles from within New York, his § 396-aa claim must be dismissed. See Def. Mem. at 10. n9

n9 Nowhere in the amended complaint does plaintiff allege that he received intrastate facsimiles. Indeed, based on the citizenship of defendant (for purposes of diversity jurisdiction), it is likely that defendant sent the facsimiles from Florida where it maintains its principal place of business.

Section 227(e)(1) states that [HN16] the Act does not preempt "any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits (A) the use of telephone facsimile machines or other electronic devises to send unsolicited advertisements...." (emphasis added). Moreover, the legislative history [**28] of the TCPA indicates that Congress acted pursuant to the Commerce Clause to prohibit interstate communications where the states could not because they lack jurisdiction. See U.S. Const. Art. I, § 8, cl. 3. n10 Congress found that "over half the States now have statutes restricting various uses of the telephone for marketing, but telemarketers can evade their prohibitions through interstate operation; therefore, Federal law is needed to control residential telemarketing practices." § 227, Congressional Statement of Findings (7). See also Van Bergen v. Minn., 59 F.3d 1541, 1548 (8th Cir. 1995) (congressional finding (7) "suggests that the TCPA was intended ... to provide interstitial law preventing evasion of state law by calling across state lines"). Courts recognize that Congress enacted the TCPA to supplement similar state legislation to protect the privacy interests of residential phone subscribers against unwanted interstate phone and facsimile solicitations "because states do not have jurisdiction over interstate calls." Foxhall, 156 F.3d at 437 (citing S. Rep. No. 178, 102nd Cong., 1st Sess. 1, 1 (1991), U.S. Code Cong. & Admin. News at [**29] 1968, [*311] 1968); see also ErieNet, 156 F.3d at 515 ("state regulation of telemarketing activity was ineffective because it could be avoided by interstate operations"); Int'l Science, 106 F.3d at 1154; Schulman, 268 A.D.2d at 175 (states do not have jurisdiction over interstate calls alleged to violate the TCPA); Giovanniello v. Hispanic Media Group USA, Inc., 4 Misc. 3d 440, 780 N.Y.S.2d 720, 721 (N.Y. Sup. Ct. 2004) (citing congressional record statement that the TCPA "facilitate[s] interstate commerce by restricting certain uses of facsimile (fax) machines and automatic dialers"). n11

n10 While plaintiff acknowledges that the legislative history of the TCPA reveals Congress's belief that states did not have jurisdiction over interstate faxes or phone calls, he characterizes this belief as "unsubstantiated." Pl. Opp. at 9. Yet he invokes Commerce Clause jurisprudence holding that states may enact laws affecting interstate commerce only where the laws do not discriminate against out-of-state entities. Id. This contention is unpersuasive because instead of providing support for the conclusion that § 396-aa applies to both interstate and intrastate communications, it merely argues that the law would be permissible if it did apply to both interstate and intrastate communications.

[**30]

n11 In Texas v. Am. Blastfax, Inc., 121 F. Supp. 2d 1085, 1087 (W.D. Tex. 2000), the court considered whether the TCPA applies to both interstate and intrastate faxes. It concluded that the Act does apply to intrastate faxes. "Congress has authority to regulate intrastate faxes ... because telephones and telephone lines-even when used solely for intrastate purposes-are part of an aggregate interstate system and therefore are inherent instrumentalities of interstate commerce." Id. In so holding, the court recognized that "the TCPA was meant to supplement state law." Id. at 1088 n.2.

While plaintiff is correct that § 396-aa does not expressly limit its application to claims based on intrastate facsimiles, see Pl. Opp. at 9, the Court is persuaded to join the weight of authority holding that state laws such as § 396-aa apply only to intrastate communications in view of Congress's intent that the TCPA extend the reach of state laws by regulating interstate communications. Accordingly, because plaintiff has not alleged that defendant -- a Panama corporation [**31] with its principal place of business in Florida -- sent him any intrastate faxes, plaintiff fails to state a claim upon which relief can be granted under N.Y. Gen. Bus. Law § 396-aa.

CONCLUSION

For the foregoing reasons, the Court grants defendant's motion to dismiss with respect to plaintiff's TCPA claims (counts One, Two and Three) and grants defendant's motion to dismiss with respect to plaintiff's cause of action under N.Y. Gen. Bus. Law § 396-aa (Count Four). The Court dismisses plaintiff's claims without prejudice to their renewal in state court. The Clerk of Court is respectfully directed to close this case.

SO ORDERED.

Dated: April 28, 2005

Brooklyn, New York

s/

I. Leo Glasser

United States District Judge

Cellco Partnership, doing business as Verizon Wireless; Verizon Wireless, doing business as Verizon Wireless, (VAW) L.L.C.; Duluth MSA, doing business as Verizon Wireless, Limited Partnership; Midwest Wireless Holdings, L.L.C.; Midwest Wireless Communications, L.L.C.; American Cellular Corporation; Rural Cellular Corporation, doing business as Cellular 2000; Sprint Spectrum L.P.; AT&T Wireless Services of Minnesota , Inc.; Voicestream Minneapolis, Inc.; T-Mobile USA, Inc., Appellants, v. Mike Hatch, in his official capacity as Attorney General of Minnesota and not as an individual, Appellee. Cellular Telecommunications & Internet Association; Federal Communications Commission, Amici on Behalf of Appellant, AARP; National Association of State Utility Consumer Advocates; National Association of Consumer Advocates, Amici on Behalf of Appellee.

No. 04-3198

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

431 F.3d 1077; 2005 U.S. App. LEXIS 26887

May 11, 2005, Submitted
December 9, 2005, Filed

PRIOR HISTORY: [*1] Appeal from the United States District Court for the District of Minnesota. Cellco P'ship v. Hatch, 2004 U.S. Dist. LEXIS 18464 (D. Minn., Sept. 3, 2004)

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiffs, a wireless communications services provider and others, filed an action against defendant, the Attorney General of Minnesota, alleging that Minn. Stat. § 325F.695, subd. 3 was preempted by 47 U.S.C.S. § 332(c)(3)(A). The United States District Court for the District of Minnesota dissolved a temporary restraining order it had previously entered, finding that plaintiffs' claims did not have a likelihood of success. Plaintiffs appealed.

OVERVIEW: The provider contended that Minn. Stat. § 325F.695 was preempted by the Communications Act of 1934, 47 U.S.C.S. § § 151-614, and invalid under several provisions of the United States Constitution, and it sought an injunction against enforcement of Minn. Stat. § 325D.695. The court held that fixing rates of providers was rate regulation and concluded that § 325D.695, subd. 3 constituted impermissible rate regulation preempted by federal law. The requirement of that consumers consent to any substantive change prevented providers from raising rates for a period of time, and thus fixed the rates, and the 60-day notification period effectively froze rates for 60 days when the provider notified a customer of a proposed change in rates. Moreover, a benefit to consumers, standing alone, was plainly not sufficient to place a state regulation on the permissible side of the federal/state regulatory line drawn by § 332(c)(3)(A). In addition, pursuant to Minn. Stat. § 645.20, the remaining subdivisions of Minn. Stat. § 325D.695 were connected with and dependent upon § 325D.695, subd. 3 and were not severable. Thus, § 325D.695 was enjoined in its entirety.

OUTCOME: The court reversed the district court's partial denial of the provider's request for a preliminary injunction, and it remanded for entry of a permanent injunction against enforcement of the state provision.

LexisNexis(R) Headnotes

Communications Law > Federal Acts > Communications Act
Communications Law > Telephony > Cellular, Mobile & Wireless Carriers
[HN1] See 47 U.S.C.S. § 332(c)(3)(A).

Communications Law > Telephony > Cellular, Mobile & Wireless Carriers
[HN2] A "mobile service" is defined as a radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves. 47 U.S.C.S. § 153(27).

Constitutional Law > Supremacy Clause
Governments > Legislation > Interpretation
[HN3] A court's interpretation of the scope of an express preemption clause must rest primarily on a fair understanding of congressional purpose, and the court presumes that Congress does not intend preemption of historic police powers of the States unless that was its clear and manifest purpose.

Communications Law > Federal Acts > Communications Act
Communications Law > Telephony > Cellular, Mobile & Wireless Carriers
Constitutional Law > Supremacy Clause
[HN4] Fixing rates of providers is rate regulation, and the United States Court of Appeals for the Eighth Circuit concludes that Minn. Stat. § 325F.695, subd. 3 constitutes impermissible rate regulation preempted by federal law.

Communications Law > Federal Acts > Communications Act
Communications Law > Telephony > Cellular, Mobile & Wireless Carriers
Constitutional Law > Supremacy Clause
[HN5] A benefit to consumers, standing alone, is plainly not sufficient to place a state regulation on the permissible side of the federal/state regulatory line drawn by 47 U.S.C.S. § 332(c)(3)(A). To avoid subsuming the regulation of rates within the governance of "terms and conditions," the meaning of "consumer protection" in this context must exclude regulatory measures, such as Minn. Stat. § 325F.695, that directly impact the rates charged by providers.

Communications Law > Federal Acts > Communications Act
Communications Law > Telephony > Cellular, Mobile & Wireless Carriers
Constitutional Law > Supremacy Clause
[HN6] Minn. Stat. § 325F.625, subd. 3 goes beyond traditional requirements of contract law, and thus falls outside the scope of the neutral application of state contractual or consumer fraud laws, which the Federal Communication Commission has said is permissible state regulation of wireless providers.

Communications Law > Federal Acts > Communications Act
Communications Law > Telephony > Cellular, Mobile & Wireless Carriers
Constitutional Law > Supremacy Clause
[HN7] Minn. Stat. § 325F.625, subd. 3 cannot be deemed a "neutral application of state contractual or consumer fraud laws" that avoids the preemptive force of 47 U.S.C.S. § 332(c)(3)(A).

Governments > Legislation > Suspension, Expiration & Repeal
[HN8] Whether one provision of a statute is severable from the remainder is a question of state law.

Governments > Legislation > Suspension, Expiration & Repeal
[HN9] In Minnesota, the remaining provisions of a statute shall be valid, unless the court finds the valid provisions of the law are so essentially and inseparably connected with, and so dependent upon, the void provisions that the court

cannot presume the legislature would have enacted the remaining valid provisions without the void one, or unless the court finds the remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent. Minn. Stat. § 645.20. To give these clauses independent meaning, the United States Court of Appeals for the Eighth Circuit understands the former clause to forbid severance in cases where the remaining provisions are not incomplete or incapable of being executed, but where the interrelationship of the void and non-void provisions nonetheless precludes the presumption that the legislature would have enacted only the latter provision.

Communications Law > Federal Acts > Communications Act
Communications Law > Telephony > Cellular, Mobile & Wireless Carriers
Constitutional Law > Supremacy Clause
Governments > Legislation > Suspension, Expiration & Repeal
[HN10] The United States Court of Appeals for the Eighth Circuit concludes that Minn. Stat. § 325F.625, subds. 1, 2, and 4 are not severable from § 325F.625, subd. 3, and that Minn. Stat. § 325F.625 should be enjoined in its entirety.

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JUDGES: Before WOLLMAN, BYE, and COLLOTON, Circuit Judges.

OPINIONBY: COLLOTON

OPINION: COLLOTON, Circuit Judge.

Cellco Partnership and its co-appellants (collectively, "Cellco") appeal from the district court's partial denial of their request for a preliminary injunction against implementation and enforcement of Minnesota Statutes § 325F.695 ("Article 5"). n1 The district court ruled that Cellco's claims - that Article 5 was preempted and that the statute was unconstitutionally vague - did not have a likelihood of success on the merits, and dissolved the temporary restraining order it had previously entered. We reverse and remand for entry of a permanent injunction.

> n1 The district court granted Cellco's request for a preliminary injunction barring Attorney General Hatch and employees of the State from "taking any action to prevent wireless communications providers from passing through to customers federally assessed fees," pursuant to its determination that Article 5 conflicted with 47 C.F.R. § 54.712(a), which authorized recovery of the fees. This portion of the district court's order is not challenged on appeal.

[*4]

I.

On May 29, 2004, the Governor of Minnesota signed into law Article 5 of House File No. 2151, entitled "Wireless Consumer Protection." Article 5 imposes several requirements on Cellco and other providers of wireless telecommunications services. The statute forbids the providers to implement changes in the terms and conditions of subscriber contracts that "could result" in increased rates or an extended contract term, unless they first obtain affirmative written or oral consent from the subscriber. Minn. Stat. § 325F.695, subd. 3; *see id.* § 325F.695, subd. 1(d). Article 5 also requires providers to deliver copies of the subscriber contracts to the subscribers, *id.*, subd. 2, and, in the event a subscriber proposes a change to the contract, to disclose clearly any rate increase or contract extension that could result from the change. *Id.*, subd. 4. The statute further requires providers to maintain recorded or electronic verification of the "disclosures" required by the law. Article 5 was scheduled to take effect on July 1, 2004, but on June 16, Cellco filed suit in the District of Minnesota seeking a declaration that, among other things, Article 5 [*5] was preempted by the Communications Act of 1934, 47 U.S.C. § § 151-614, and invalid under several provisions of the United States Constitution. Cellco also sought an injunction against enforcement of Article 5.

The district court first granted a temporary restraining order against enforcement of Article 5, ruling that Cellco had "shown an initial likelihood of success on at least a portion of [its] preemption argument." (Add. at 24). On consideration of Cellco's request for a preliminary injunction, however, the court reached a different conclusion. The district court concluded that Cellco had not satisfied the standard for preliminary injunctions set forth in *Dataphase Systems, Inc. v. C L Systems, Inc.*, 640 F.2d 109, 113 (8th Cir. 1981) (en banc), with respect to its claim that Article 5 is preempted, except to the extent that Article 5 applied to Cellco's attempts to pass along the costs of contributions to the Universal Service Fund pursuant to 47 C.F.R. § 54.712(a). The district court also determined that Cellco did not meet the *Dataphase* test with respect to its claim that Article 5 is unconstitutionally [*6] vague. As a result, the district court dissolved its temporary restraining order effective September 15, 2004. We granted a stay pending appeal.

Although the district court analyzed the preemption question under the "likelihood of success on the merits" prong of the test for granting preliminary injunctions, *see Dataphase*, 640 F.2d at 113, Cellco now proposes without objection from the State that there are only legal issues unresolved on appeal. Accordingly, we consider Cellco's motion as one for a permanent injunction. *See Bank One v. Guttau*, 190 F.3d 844, 847 (8th Cir. 1999).

II.

Cellco urges that Article 5 is expressly preempted by a federal statute, [HN1] § 332(c)(3)(A) of the Communications Act of 1934, which provides in relevant part:

> No State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.

47 U.S.C. § 332(c)(3)(A). [HN2] A "mobile service" is defined as a "radio communication [*7] service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves," *id.* § 153(27); *see id.* § 332(d), and it is undisputed that Cellco is a commercial mobile service ("CMRS" or "provider"). The parties also agree that Article 5 does not regulate market entry, so whether any part of Article 5 is expressly preempted by § 332(c)(3)(A) turns on whether the statute regulates "rates charged" by providers. [HN3] Our interpretation of the scope of an express preemption clause "must rest primarily on a fair understanding of congressional purpose," *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485-86, 116 S. Ct.

2240, 135 L. Ed. 2d 700 (1996) (internal quotation and emphasis omitted), and we presume that Congress does not intend preemption of historic police powers of the States "unless that was [its] clear and manifest purpose." *Id.* at 485.

Section 332(c)(3) was added to the Communications Act in 1982, *see* An Act to amend the Communications Act of 1934, Pub. L. No. 97-259, § 120(a), 96 Stat. 1087, 1096 (1982), and its original preemption language provided that "no State or local government shall have any authority [*8] to impose any rate or entry regulation upon any private land mobile service, except that nothing in this subsection may be construed to impair such jurisdiction with respect to common carrier stations in the mobile service." 47 U.S.C. § 332(c)(3) (1992). An amendment in 1993 gave § 332(c)(3)(A) its current form, introducing the commercial/private mobile service distinction and providing for state regulation of "other terms and conditions." *See* Omnibus Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002, 107 Stat. 312, 394 (1993).

The legislative history of the 1993 amendment speaks only briefly and indirectly about the meaning of "rate" regulation. A report from the House Budget Committee elaborated on the meaning of "other terms and conditions," which the statute distinguishes from the regulation of "rates" and "market entry":

> By "terms and conditions," the Committee intends to include such matters as customer billing information and practices and billing disputes and other consumer protection matters; facilities siting issues (*e.g.*, zoning); transfers of control; the bundling of services and equipment; and the requirement that carriers [*9] make capacity available on a wholesale basis or such other matters as fall within a state's lawful authority. This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under "terms and conditions."

H.R. Rep. No. 103-111, at 261 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 588.

As the agency charged with administering the Communications Act, *see* 47 U.S.C. § 151, the FCC has interpreted § 332(c)(3)(A) on several occasions, often relying on the aforementioned legislative history. n2 The FCC has determined that a State's review of the rates charged by providers prior to implementation of the rates, where the review often occasioned delays of 30 days before new rate offerings could take effect, is "rate regulation" for purposes of § 332(c)(3)(A). *Pet. on Behalf of the State of Hawaii, Pub. Util. Comm'n*, 10 F.C.C.R. 7872, 7882 (1995). The Commission also has ruled that regulation of rates includes regulation of "rate levels and rate structures," such as whether to charge for calls in whole-minute increments and whether to charge for both incoming and outgoing calls, and that [*10] States are prohibited from prescribing "the rate elements for CMRS" and from "specifying which among the CMRS services provided can be subject to charges by CMRS providers." *Southwestern Bell Mobile Sys., Inc.*, 14 F.C.C.R. 19898, 19907 (1999).

> n2 The FCC has filed an amicus brief in this case asserting that Article 5 is preempted by § 332(c)(3)(A) because Article 5 is not a "generally applicable" state contract or consumer fraud law. Cellco urges us to accord "some" deference to the FCC's litigating position, citing the Supreme Court's grant of deference to an agency's amicus brief where there is "no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." *See Auer v. Robbins*, 519 U.S. 452, 462, 117 S. Ct. 905, 137 L. Ed. 2d 79 (1997). We note, however, that the FCC is in the midst of a rulemaking process designed to consider the merits of a rule similar to that espoused in the amicus brief. *See Truth-in-Billing & Billing Format*, 20 F.C.C.R. 6448, 6475-76 (2005) (second report and order, declaratory ruling, and second further notice of proposed rulemaking). The agency's position thus appears somewhat fluid, and perhaps short of "considered judgment." *See id.* at 6476 ("We *tentatively* conclude that the line between the Commission's jurisdiction and states' jurisdiction over carriers' billing practices is properly drawn to where states only may enforce their own generally applicable contractual and consumer protection laws, albeit as they apply to carriers' billing practices.") (emphasis added). In any event, because our consideration of the FCC's previous adjudications and our interpretation of § 332(c)(3)(A) independently lead to our conclusion, we need not decide whether deference to the FCC's position in its brief is appropriate here.

[*11]

In light of the legislative history classifying billing information, practices, and disputes as "other terms and conditions," however, the FCC has concluded that "state law claims stemming from state contract or consumer fraud laws governing disclosure of rates and rate prac-

tices are not generally preempted under Section 332." *Id.* at 19908. The FCC later clarified that while § 332(c)(3) "does not generally preempt the award of monetary damages by state courts based on state consumer protection, tort, or contract claims[,] . . . whether a specific damage calculation is prohibited by Section 332 will depend on the specific details of the award and the facts and circumstances of a particular case." *Wireless Consumers Alliance, Inc.*, 15 F.C.C.R. 17021, 17022 (2000). In reaching that conclusion, the Commission noted that the "indirect and uncertain effects" of damage awards pursuant to state contract and tort law are not the same as the effects of direct rate regulation, and that although such awards may increase the costs of doing business, these costs "fall no more heavily on CMRS providers than on any other business." *Id.* at 17034-35 (internal [*12] quotation omitted).

Cellco focuses its preemption arguments primarily on subdivision 3 of the Minnesota statute. Subdivision 3 is entitled "Provider-initiated substantive change," and it mandates that providers

> must notify the customer in writing of any proposed substantive change in the contract between the provider and the customer 60 days before the change is proposed to take effect. The change only becomes effective if the customer opts in to the change by affirmatively accepting the change prior to the proposed effective date in writing or by oral authorization which is recorded by the provider and maintained for the duration of the contract period. If the customer does not affirmatively opt in to accept the proposed substantive change, then the original contract terms shall apply.

Minn. Stat. § 325F.695, subd. 3. A "substantive change" is defined in relevant part as "a modification to, or addition or deletion of, a term or condition in a contract that could result in an increase in the charge to the customer under that contract or that could result in an extension of the term of that contract." *Id.* § 325F.695, subd. 1(d).

We agree [*13] with the FCC that [HN4] "fixing rates of . . . providers" is rate regulation, *see Pet. of Pittencrieff Communications, Inc.*, 13 F.C.C.R. 1735, 1745 (1997), and we conclude that subdivision 3 of the Minnesota statute constitutes impermissible rate regulation preempted by federal law. The requirement of subdivision 3 that consumers consent to any substantive change prevents providers from raising rates for a period of time, and thus fixes the rates. The 60-day notification period created by subdivision 3 effectively freezes rates for 60 days when the provider notifies a customer of a proposed change in rates. The State's position - that Article 5 imposes only a "window within which the customer has to decide whether or not to accept a change proposed by the wireless provider," and that rate changes could go into effect immediately upon the consumer's consent - strikes us as inconsistent with the plain meaning of the text of the statute. Subdivision 3 requires that providers notify customers of "any proposed substantive change . . . 60 days before the change is proposed to take effect," and this change may take effect only if the customer "opts in" before "the proposed effective [*14] date." Minn. Stat. § 325F.695, subd. 3. A proposed change thus must include a proposed effective date, and modification of the "effective date" is not contemplated by the statute.

But even accepting the State's interpretation, under which rates may be changed as soon as a customer manifests assent, the statute still fixes rates for at least some customers to some degree. If even one customer declines to "opt in" to a provider's proposed rate increase, then the rate for that customer's service would be fixed for the term of the existing contract, often one or two years. Even assuming, *arguendo* (and contrary to our experience with human nature), that all consumers would willingly accept rate hikes when proposed, and thus "opt in" before the expiration of the 60-day period, subdivision 3 indisputably freezes rates for *some* period - at least until the consumer manifests acceptance. The statute thus requires providers to maintain rates different from those that would be charged if the providers were left to follow the terms of their existing contracts, which typically allow an adjustment of rates after reasonable notice of fewer than 60 days. (J.A. at [*15] 146, 149).

The State argues that subdivision 3 is a consumer protection measure that "furthers the underlying traditional requirements of contract law as a way to protect consumer interests" by guarding consumers against unilateral contract changes. "Consumer protection matters," it notes, were among the matters listed by the House Budget Committee as illustrative of "terms and conditions" that would be open to state regulation under § 332(c)(3)(A). H.R. Rep. No. 103-11, at 261. We find this argument overbroad, and we are not persuaded. Any measure that benefits consumers, including legislation that restricts rate increases, can be said in some sense to serve as a "consumer protection measure," but [HN5] a benefit to consumers, standing alone, is plainly not sufficient to place a state regulation on the permissible side of the federal/state regulatory line drawn by § 332(c)(3)(A). To avoid subsuming the regulation of rates within the governance of "terms and conditions," the meaning of "consumer protection" in this context must

exclude regulatory measures, such as Article 5, that directly impact the rates charged by providers.

[HN6] Subdivision 3, moreover, goes beyond traditional requirements [*16] of contract law, and thus falls outside the scope of the "neutral application of state contractual or consumer fraud laws," which the FCC has said is permissible state regulation of wireless providers. This statute effectively voids the terms of contracts currently used by providers in one industry, and substitutes by statute a different contractual arrangement. The existing contracts exemplify an "opt-out" structure - that is, they permit the providers to effect rate increases upon reasonable notice to the customer, whose continued use of the service binds him to the new rate unless he affirmatively declines to accept the changes. (J.A. at 149). Subdivision 3 mandates an "opt-in" contract structure: the provider cannot increase rates unless the customer affirmatively accepts the changes. The State contends that the current structure used by the providers renders the contracts "illusory," because it permits the providers "unilaterally" to "change the contract's terms," (Appellee's Br. at 33), but we are not convinced. There is no indication that "opt-out" contracts of the sort used by the providers are considered illusory under Minnesota's consumer protection statutes or its common [*17] law, and in fact, such contracts are generally accepted as legal and binding. *See Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 173-74 (5th Cir. 2004); *cf. Pine River State Bank v. Mettille*, 333 N.W.2d 622, 627 (Minn. 1983) (declaring enforceable the acceptance, by continued performance, of modification in a unilateral contract for employment). [HN7] Subdivision 3, therefore, cannot be deemed a "neutral application of state contractual or consumer fraud laws" that avoids the preemptive force of the federal statute. *See Wireless Consumers Alliance*, 15 F.C.C.R. at 17025-06. A waiting period on any proposed rate changes, whether it be for 60 days or some shorter period pending a customer's decision to "opt in," has a clear and direct effect on rates. We thus conclude that subdivision 3 effectively regulates rates, and is preempted by § 332(c)(3)(A).

III.

There remains the question whether the other subdivisions of Article 5 may be enforced independent of subdivision 3. [HN8] Whether one provision of a statute is severable from the remainder is a question of state law. *Leavitt v. Jane L.*, 518 U.S. 137, 139, 116 S. Ct. 2068, 135 L. Ed. 2d 443 (1996). [*18] [HN9] In Minnesota, the remaining provisions of a statute shall be valid, "unless the court finds the valid provisions of the law are so essentially and inseparably connected with, and so dependent upon, the void provisions that the court cannot presume the legislature would have enacted the remaining valid provisions without the void one," or "unless the court finds the remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent." Minn. Stat. § 645.20. To give these clauses independent meaning, we understand the former clause to forbid severance in cases where the remaining provisions are *not* incomplete or incapable of being executed, but where the interrelationship of the void and non-void provisions nonetheless precludes the presumption that the legislature would have enacted only the latter provision. *See Archer Daniels Midland Co. v. State*, 315 N.W.2d 597, 600 (Minn. 1982) (concluding remaining provisions of statute, standing alone, were not severable, where legislative intent to prefer limited application of statute was "not at all clear."); *Bang v. Chase*, 442 F. Supp. 758, 771 (D. Minn. 1977) [*19] (three-judge court).

We believe that the remaining subdivisions of Article 5 - a definitional section, a provision requiring wireless providers to furnish customers with a copy of written contracts, and a subdivision regulating "customer-initiated changes" - are connected with and dependent upon subdivision 3. The legislative history shows that subdivision 3 was the motivating force behind Article 5. The principal Senate sponsor, for example, explained that "the reason for the genesis of this bill . . . is people in our area were contacting our local representative . . . and telling him that their contracts were being changed without their consent." (J.A. 361).

The three substantive subdivisions were then conceived together as a unified effort to regulate certain practices of wireless telecommunications service providers. The requirement of subdivision 2 that providers furnish customers with a written copy of *existing* contracts serves as foundation for the later subdivisions, which require disclosure of proposed changes to those existing contracts. As the principal House sponsor explained, "keep in mind we are just doing two things: One) we want to verify in the records that [*20] the customer did agree to a contract in the first place and two) if a unilateral change is made in that contract by the provider, the customer is off the hook." (J.A. 384). Subdivisions 3 and 4 work in tandem as requirements for consent and disclosure, depending on whether a change in contractual terms is "provider-initiated" or "customer-initiated."

The legislature recognized that the regulatory provisions would place a burden on the industry, and potentially would raise costs for consumers. The principal House sponsor remarked that depending on how the legislation was crafted, "it could turn into something that ends up costing everybody more money and it does kind of complicate the whole process." (J.A. 383). The legislature ultimately concluded that the expected benefits to the consumer outweighed concerns about costs to providers and the system, but it enacted a two-year sunset

provision, so, as one representative put it, "we can all reevaluate whether or not that is cumbersome or not, or if it works as well as many think it may work." (J.A. 396; *see also* J.A. 387). "Providerinitiated " substantive changes were central to the development of Article 5, and we find it difficult [*21] to presume that the legislature would have enacted the two remaining substantive provisions standing alone, with their attendant costs to the system, if it had been precluded at the outset from regulating in the area of principal concern and perceived benefit to consumers - that is, provider-initiated changes. It also bears noting that one senator active in the legislative process surrounding Article 5 commented on the "complexities of all the moving pieces" in the proposed legislation, and on the need to ensure that each of the "multiple moving pieces" fit together in a final bill. (J.A. 394).

[HN10] We conclude, therefore, that subdivisions 1, 2, and 4 are not severable from subdivision 3, and that Article 5 should be enjoined in its entirety. The remaining articles of House File No. 2151 operate independently, and they remain valid. This conclusion makes it unnecessary for us to consider Cellco's contentions that subdivisions 1, 2 and 4 of Article 5 are unconstitutionally vague, because the subdivisions fail to define such important statutory terms as "customer" and "disclosure," and because the statute defines "substantive change" indefinitely as any modification of contract that "could [*22] result" in an increase in charges. *See Planned Parenthood of Idaho v. Wasden*, 376 F.3d 908, 937 (9th Cir. 2004). If and when the legislature revisits this area, it will be in a position to consider whether more precise definitions are appropriate.

* * *

For the foregoing reasons, we reverse the district court's partial denial of Cellco's request for a preliminary injunction and remand for entry of a permanent injunction against enforcement of Article 5.